

A N
I N S T I T U T E
O F T H E
L A W S
O F
S C O T L A N D
I N
C I V I L R I G H T S:

W I T H

OBSERVATIONS upon the Agreement or Diversity
between them and the LAWS of *ENGLAND*.

I N F O U R B O O K S.

After the General Method of the Viscount of STAIR'S INSTITUTIONS.

By ANDREW M^cDOUALL, *Esq; Advocate.*

Scire leges non hoc est, verba earum tenere, sed vim ac potestatem.

L. 17. ff. DE LEGIBUS.

V O L. II.

E D I N B U R G H.

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M.DCC.LII.

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T O
THE RIGHT HONOURABLE
P H I L I P
LORD *HARDWICK*,
Lord High Chancellor of GREAT BRITAIN;

Who, amongst his other eminent Virtues and high Abilities, is, with a thorough Knowledge of LAW and EQUITY in the Courts of SOUTH-BRITAIN, conversant and learned in the Laws and Constitution of NORTH-BRITAIN, to the great Felicity of the Subjects; who see, with equal Benefit and Pleasure, that HIGH STATION filled with an ILLUSTRIOUS PERSON, so qualified, in every Respect, to sit at the Head of the LAW in the United Kingdom,

T H I S
SECOND VOLUME of the INSTITUTE of the LAWS
of *Scotland*, with OBSERVATIONS on those of *England*,

Is most humbly inscribed by,

His Lordship's

Most devoted, and

Most obedient

Humble Servant,

ANDREW M^cDOUALL.

A
T A B L E
OF THE
T I T L E S
OF THE
S E C O N D V O L U M E
OF THE
Institute of the LAWS of SCOTLAND, &c.

*N. B. That Observations on the Law of England are subjoined to each Title of the second and third Books, (except the last Title of the third) and to several Titles of the fourth; and such as want them are thus marked *.*

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AT publishing the First Volume, it was thought (as suggested in the Preface) that the Remainder of the Work might conveniently be comprised in another; but, thro' the Variety and Copiousness of the Subjects, it is drawn out to so great a Length, that this could not be done without swelling it to an immoderate Bulk. Wherefore I have concluded this Volume, with the Title upon Judgments or Decrees of Courts, which makes it of the like Size with the first. And the nine Titles which still remain, together with the Contents and two Indexes, will be contained in another smaller Volume. The Contents is, in a manner, a Compend of the whole Treatise, and will give, at one View, an Hint of all the principal Matters treated on in this large Work. And there will be one Index to the whole, so far as concerns the Scots Law, and another as to the Observations upon the Law of England. Some Terms are used in the one Law unknown in the other, and as I had kept them distinct throughout, they could not well be blended together in one Index.

AND as it hath so happened that the Author is as generally known as if his Name had been originally prefixed to the Work, it is now added in the Title, to avoid the Imputation of an affected Modesty, by pretending longer to conceal the same.



E R R A T A.

PAGE 328. Line 6. for (actual) read, active.
P. 374. L. 2. for (turtius) r. tortious.
P. 397. L. pen. for (executor) r. executors.
P. 467. L. 9. dele, or.

Page 479. Line 3. add, to.
P. 480. L. 35. for (clineable) r. declineable.
P. 676. L. 9. in princip. dele, is.
P. 681 L. 3. place the punctum before (only).

AN
INSTITUTE
OF THE
LAWS of SCOTLAND
IN
CIVIL RIGHTS.

WITH
OBSERVATIONS upon the Agreement or Diversity between
them, and the LAWS of ENGLAND, &c.

BOOK II.

RIGHTS REAL.

TIT. VIII.

*Ecclesiastical Benefices, Patronage, Tithes, Stipends, and other matters
relating thereto.*

SECTION I. *The general nature of Ecclesiastical Benefices.*

ECCLESIASTICAL Benefices justly merit our regard and attention; for as to lands, and other temporal interests that belonged to them, they are holdings of great importance; and as to the Tithes, these are a kind of universal servitude on the fruits, imposed by public law: and therefore, whether we consider the Temporality, *i. e.* the lands and baronies, or the Spirituality, *i. e.* the tithes that belonged to church-benefices, they may be properly treated on here. I shall not minutely descend into all the questions which concern benefices and tithes, for that would require a particular volume; I shall only consider them so far as they may lead to the knowledge of Ecclesiastical holdings, and the present state of tithes, and ministers stipends with us. At the same time I shall treat of patronage of churches, which has a natural relation to benefices, and of other matters touching ecclesiastical livings, tithes and stipends.

1. The chief subject of this title; ecclesiastical holdings, tithes and patronages.

THESE benefices are termed Ecclesiastical, in contradistinction to temporal benefices of feudal tenures, which originally were Benefices. Under this denomination are comprehended all ecclesiastical livings: they are called *Benefices*, because they originally proceeded from the bounty and benevolence of those who endowed churches, and were solely at their grant, who therefore became patrons of such church-

2. Why church-livings are termed benefices.

2 An Institute of the LAWS of SCOTLAND. BOOK II.

es, as shall afterwards appear; and still the concession of them must be free and gratuitous, otherwise the crime of Simony is incurred, whereby the settlement is void, and the purchaser declared incapable of that or any other benefice: this holds by the canon law, even tho' the consideration was given or promised without the knowledge of the person in whose favour the benefice is procured^a; for, otherwise, mercenary settlements could not be prevented.

^a C. 28. ext. de simon.

3. The anti-ent state of church-benefices, and how thereafter ordered.

ANTIENLY ecclesiastical revenues were divided into four parts, whereof one was allotted to the bishop, another to the clergy under him, and a third to the use of the poor within the diocese, and the fourth to upholding the fabric of the church^b; and such distribution took place in France, by the ordinance of Charles the Great, who first brought church-livings under a regular settlement there, as we are informed by an accurate author^c: but thereafter church-revenues becoming very large and extensive, they were put into distinct titles, called Ecclesiastical Benefices, which varied according to the respective offices, charges, and uses whereto they were applied. They were the livings destinated for the clergy, and persons of religious profession. In order to the apprehending their nature, I shall take notice of the several distinctions of them that may tend to that purpose.

^b Causa 12. quest. 2. c. 23.

^c L'esprit des loix, tom. 2. p. 449. a Edinburgh, 1750

SECTION II. *The several Distinctions of Ecclesiastical Benefices.*

4. The division of benefices into prelaties, and inferior benefices.

THE first distinction of benefices I shall mention, is that into Prelacies, and Inferior Benefices. Prelacies are Bishopricks, Deanries, Abbeys, Priories, &c. They are so termed, because they belonged to a society or body politic, of which one had the constant superiority, and presided over the rest, and therefore was called *Prelate*: those were likewise denominated *Ecclesiastical Dignities*, in respect of their pre-eminence. Inferior Benefices were Parsonages, Vicarages, Chaplainries, &c. so called, because they were inferior in wealth and dignity to prelaties. Episcopacy being abolished in Scotland, and Popish religious houses suppressed, all benefices with us are of the inferior kind; and indeed divers emoluments of those are sunk into the property of titulars, patrons and heritors, parish-churches having become stipendiary, for most part, as shall hereafter be shown.

5. Their distinction into cathedral, conventual, and parochial; the state of cathedral churches.

2. BENEFICES are either Cathedral, Conventual, or Parochial. Cathedral are these which are governed by a Bishop and Chapter. The Chapter consists of a Dean, who presides, and other members who have their respective offices, as Chancellor, Treasurer, &c. and Canons or Prebendaries, so termed, because they have stated canonical portions or prebends allotted to them, according to their several stalls or stations.

IT is singular, that the chapter of the archbishop of St. Andrews were the prior and convent of that city, the prior being dean, and the conventual brethren the other members; the occasion and origin of which is fully set forth by a learned and accurate author^d: but, after that priory was suppressed, and the lands belonging to it erected in a temporal lordship, ministers of certain parishes within the diocese

^d Hope pract. observ. tit. 2. § 25.

TIT. VIII. Distinction of Ecclesiastical Benefices. 3

^a P. 1617.
^c 2.
^b Nov. 9th,
1624. Hope.

^c C. 11.
^c 14. ex. de
major. et o-
bed.
^d C. 2. ext.
ne sede vac.
Spotsw. tit.
(kirkmen).
^e Dd. cap.

cese were assumed for his ordinary chapter^a; but they remained, as before, under their respective patrons^b, and did not, as members of other chapters, require the consent of the bishop and chapter to deeds relating to their benefices, but only of their own patrons. In the election of an archbishop, certain bishops were adjoined as extraordinary members. The chapter was a council to the bishop, and he behoved to take their consent to most deeds of administration, and, during the vacancy of a bishopric, the ordinary jurisdiction devolved to them^c; but the chapter had not then power of conferring benefices, nor of granting, or even renewing, feus to vassals^d.

CONVENTUAL Benefices are those which were governed by an abbot, abbess, or prior and convent: the conventual brethren, or the constant members of the religious house, were the same to their superiors, as chapters to bishops^e. Some abbots and priors were exempt from the jurisdiction of the diocesan bishop, by special privilege, in which case they had episcopal authority within their limits, and were immediately subject to the papal see: those were mitred, and were lords of parliament, said to be on account of the baronies and lordships of which they were possessed, and, together with the bishops, constituted the spiritual estate of parliament: the other abbots and priors, subject to the diocesan bishop in all spiritual government, were not lords of parliament; for they were supposed to be sufficiently represented by the bishops, to whom they were subject; but, since they held their baronies and lordships of the crown, in the same manner as the mitred ones did, it is a little strange, that the one had the privilege to sit in parliament, and the other not: this would seem to import, that the bishops were lords of parliament in respect of their spiritual character, and that therefore the mitred abbots and priors, who were invested with the same spiritual jurisdiction, sat there, when the rest, who were destitute of it, did not.

6. Conventual benefices; abbots and priors, mitred or not mitred.

^f Reg. maj. præfat. § 10.
^g Stat. Alex. II. c. 2. ann. 1214.
^h Stat. Gulielm. I. c. 32. ann. 1165.
ⁱ Stat. Rob. I. c. 1. ann. 1306.
^k Stat. Dav. II. cap. 42. ann. 1347.

I DOUBT not, but the dignified clergy were called to the king's great council or parliament, as soon as they were settled among us. We find, that the books of the Majesty were composed by order of our king David the first, *with the council and advice of the whole realm, as well clergy as others*^f; and more particularly bishops and abbots are designed as members of parliament, many ages since^g: next, all the liberties and privileges of the clergy are declared, by an old act, to be in the king's protection^h; and this is renewed by king Robert Bruce, after our long civil warsⁱ: and, lastly, the freedom of the church is expressly ascertained, both as to their persons and benefices; and especially as to their peaceable enjoyment of their tithes, on pain of excommunication by the church, and a fine to the king, by civil authority, upon the violators of them^k.

7. When were the dignified clergy admitted to the parliament.

COLLEGIATE churches, governed by a provost the superior, and a college of prebendaries, are much of the same nature, as to their method of administration, with bishopricks or abbeys, tho' they are inferior as to their jurisdiction and dignity; and the provost had no title to sit in parliament. The principal of these collegiate churches was the chapel royal of Stirling, of which hereafter.

8. Collegiate churches.

A PA-

4 An Institute of the LAWS of SCOTLAND. BOOK II.

9. Parish-churches, either menfal, parfonages, or common churches; menfal, called likewise patrimonial; how supplied; vicarages.

A PAROCHIAL Benefice or church, is that which is constituted for adminiftring the facraments, and other divine ordinances, to the people dwelling within a certain compafs of ground, called a Parish. The parish-church, where the bifhop has his feat, is his Cathedral church; and all other parish-churches annexed thereto become of the fame nature, and are called Patrimonial or Menfal, *de menfa epifcopi*; becaufe the tithes, and other emoluments of thofe benefices, go to the maintenance of the bifhop: they are likewise called Proper churches, as being in the property of the bifhop, as others belonging to the bifhoprick are called Common, in refpect the revenues were applied to the common fupport of the canons or prebendaries, as is after mentioned.

THE bifhop fupplies the cure of thefe menfal churches by Vicars, either for life, or during pleafure, which laft are properly termed Curates. Where the vicars are perpetual, they are fettled in the fame manner as in other feparate parifhes, the vicarages being diftinct benefices; and the vicarage, or fmall tithes were allotted for the maintenance of the incumbents; and feveral vicarages had lands thereto mortified, called Vicar-Lands at this day.

10. Parfonages; fome parish-churches, both a parfonage and vicarage.

OTHER feparate parifhes within the diocefe are called Parfonages, and fubject to the bifhop's epifcopal care and jurifdiction, in refpect whereof the bifhop is termed the Ordinary. The refpective incumbents had originally the whole fruits and emoluments of thefe benefices to themfelves; but at prefent they are under the limitation in favour of patrons, introduced by the late ftatutes after mentioned: fome of thofe parish-churches were both parfonages and vicarages.

11. Menfal churches of abbeyes, &c.

MANY parish-churches were likewise united to abbeyes, and other religious houfes, and fo became patrimonial to the abbots, or other fuperiors, and were provided by them with vicars and curates, in the fame manner as bifhops provided their menfal churches.

12. Common churches, fupplied, either by the members of the chapter, or by curates.

LASTLY, divers parish-churches were given by the patrons, with confent of the bifhop of the diocefe, to the chapters of cathedral churches, or to the convents of religious houfes, for their maintenance, and were called Common churches, and fupplied either by the members of the chapter, or conventual brethren, or by vicars admitted thereto, or by curates, as in menfal churches; and fometimes parish-churches were erected by the bifhop, with confent of the patrons, into prebends of cathedral churches, and the beneficed perfons were prefented by the former patrons, and became members of the chapter; and, at laft, all common churches were declared to be of the nature of other parfonages and vicarages, and ordained to be conferred to minifters by prefentation and collation^a: and now all parish-churches are to be provided with minifters, and a fuitable maintenance out of the tithes is allotted to them.

^a P. 1594.
c. 199.

13. Some years after the reformation, the limits to fome parifhes not

EVERY parish-church, and fo much bounds as fhall be found fufficient and competent for a parish, and all churches annexed to prelacies, were, after the reformation, ordained to be provided with their own pafors and competent livings^b. Hence it appears, that, at this time,

^b P. 1581.
c. 100.

TIT. VIII. Distinction of Ecclesiastical Benefices. 5

time, the limits of some parishes were not ascertained, and that one minister had the charge of many parishes. This appears still more plain from the preamble, which sets forth, "that it was difficult, in the charge of plurality of churches, for one minister to instruct many flocks;" and churches annexed to prelacies were entirely neglected; and therefore the statute provides, "that, in the gifts of the titles to any prelacy thereafter, livings and stipends should be reserved to the ministers:" so that, before this statute, the titulars, and commendators of great benefices, gave themselves no trouble as to the providing the parish-churches, thereto annexed, with ministers and livings.

ascertained;
how were
they conferr-
ed to mi-
nisters.

NEXT, benefices were either with cure of souls, or without such cure: with cure, as bishopricks, and parish-churches or parsonages. In these the beneficed persons are bound to administer the ordinances to the people under their care, and to perform the other parts of their function, and so imply *Curam animarum*, or the charge of souls. Benefices *sine-cure*, or without cure, were such as did not imply *Curam animarum*, and were termed Simple Benefices, as prebends, &c.^a The first were called Double Benefices, because the incumbent is vested with a double character; one, whereby he is intitled to the benefice, and enjoys the profits; and the other, in virtue whereof he officiates in the sacred function: hence there is a distinction in those between the office and the benefice, and a suspension from the exercise of the office does not deprive one from the benefice.

14. Benefices,
either with
cure, or with-
out cure of
souls.

^a Rebuff.
prax. bene-
fic. par. 1.
benefic. se-
cul. quotu-
plex.

In the fourth place, benefices were either Secular, or Regular and Religious. Secular, such as were conferred to the secular clergy, so termed, because they did not sequester and confine themselves in religious houses from the world: these were bishopricks, collegiate churches, parish-churches, chaplainries, prebends, &c. The Regular Benefices were such as belonged to the regular clergy, who had the government and oversight of religious communities, set apart for contemplation and devotion: they were called *Regular*, because they were under a certain rule, prescribed to their order by their founder, which they vow at their entry to observe. They were likewise termed *Religious*, as being sequestered and set apart from secular business, in the like sense as sepulchres were called *Res religiosæ* among the Romans; and the parallel answers indifferently well; for they are deemed as dead to the world, and incapable of civil rights, almost in the same manner as slaves were by the civil law: but these religious houses, notwithstanding, had their possessions belonging to them, their superiors not being disabled to acquire and hold temporal rights; so that it was only the monks that were holden as dead to the world. When a doubt arises, thro' loss of the foundation, whether a benefice is secular or regular, the presumption lyes that it is secular, such being more beneficial to mankind^b. Religious or regular benefices were monasteries of all kinds, whether instituted for the use of men devoted to a monastick way of living, as abbeyes and priories, or for women destinated to a chaste and devout life, as nunneries.

15. Benefices,
secular or re-
gular.

^b Rebuff. ib.

^c Rebuff. ib.
seculare be-
nefic. quo-
tuplex. Gar.
de benef. par.
11. c. 7. § 4.

BUT there were some secular abbeyes and priories, as well as religious^c, such as those collegiate churches whereof the superiors were called abbots or priors, as an honourable distinction from others of lesser dignity:

16. Provost-
ries, chap-
lainries, pre-
bends, and
altarages.

6 An Institute of the LAWS of SCOTLAND. BOOK II.

dignity : but with us, superiors of collegiate, or college-churches, were called Provosts, as above, and in some of them termed Deans ; they were secular benefices instituted for the use of the founders. Many of them belonged to our kings, and others to subjects. A provostry included divers prebends, *viz.* lands or portions assigned to the canons, or prebendaries who officiated in the divine service. Chaplainries were likewise secular benefices, instituted for the conveniency of those who founded and endowed them : they were called Chapels of Ease, and, being built with approbation of the bishop, were specially termed Free chapels, and subject to the same method of provision as churches under patronage ^a. In other private chapels, the priests officiating were removeable at the pleasure of the founder. And tho' priests, in all chapels, at ordinary times, might say mass therein, yet on solemn festivals, as Christmas, Easter, &c. they could not ; for all persons then behoved to attend divine service at the parochial church ^b ; and, because none could be baptized elsewhere, without the bishop's licence, it was called the Mother-Church ^c.

^a Causa 10.
can. 6. can.
10. qu. 1.

^b C. 35. dist.
1. de conse-
crat.
^c Cap. 34.
ibid.

ALTARAGES were benefices belonging to altars, allowed for the behoof of private persons in great churches ; the mortified revenues, destinated to the priests officiating at them, were termed *Altarages, altaria* ; and the donor, for whose use and behoof the privilege of the altar was granted, was Patron, and presented to the benefice, in the same manner as in other benefices : those altarages were frequent with us in times of popery, and are at this day in popish countries ^d.

^d Garcias,
p. 1. c. 2.
§ 102.

17. Those provostries, &c. were reserved to the laic patrons ; this an act of justice.

THOSE provostries and prebends, chaplainries and altarages, instituted for the use of the founders, *viz.* for the service of religion to them and their families, having proceeded purely from their bounty, were not annexed to the crown after the reformation, but reserved to the respective laic patrons, who were bound by statute ^e to confer them to bursars, *i. e.* poor students at universities. The simple presentation to such benefice, being a *sine-cure*, is sufficient provision without any collation or institution ; but a presentation of one, and after his decease of another to such benefice, in the same grant, was found void as to the substitute who had the expectancy ; because that was conferring a benefice before it was vacant, and therefore a second presentee was preferred ^f. A reservation of the patronage of these benefices, to those interested therein, was an act of justice, and at the same time the applying their revenues and profits, in manner above, was a most reasonable expedient for the good of the public ; and whereof the patrons could not complain, upon abolition of the superstitious uses to which the same were originally mortified, since an absolute alienation had been made of such lands by their predecessors or authors. There is mention of lands founded by a burghers of Dumfermline, to an altar in the church there, for maintenance of a chaplain to serve at such altar, of which the patronage was reserved to the founder and his heirs-male ^g, and no doubt many such were.

^e P. 1567.
c. 12.

^f Jan. 24.
1677. Stew-
art.

^g Dirl.(verb.
altarage).

18. The benefices that belonged to the knights templars.

THE benefices, mortified to the knights of holy orders, as the knights of the temple, or of St. John of Jerusalem, were properly regular ; those knights being of orders instituted by the pope for the service of religion.

THE

TIT. VIII. Distinction of Ecclesiastical Benefices. 7

^a Ann. 1128.

THE templars were erected by the pope ^a, for the defence of strangers and pilgrims against the infidels; they conducted those devotees in arms, while visiting the monuments of Christianity in the holy land, as Judea was then called: they had their dwelling in a part that was supposed to have belonged to the temple at Jerusalem, whence they were termed *Templars*. This order increased greatly in number, riches and power, and was far spread over Christendom. They had a Prior residing in most kingdoms, who was their superior in those parts, and all of them were subject to the grand-master of the order, who resided in the holy land of Judea. Their lands are still known with us at this day by the name of temple-lands. After this order had flourished in all parts of Christendom for some centuries, it was at last suppressed by pope Clement V. in a council holden at Vienna, and most of their lands given to the knights of St. John of Jerusalem ^b, by the respective sovereign powers where they lay.

19. The institution, business and dissolution of the order of the knights templars.

^b Ann. 1312.

^c Ann. 1099.

THE knights of St. John were of another more antient order, instituted for the above purpose ^c: they were so called from St. John the Baptist; and their principal residence, in their infant state, was at Jerusalem. They were likewise termed Hospitalers, from an hospital which they built in that city for the reception of pilgrims. They are now called Knights of Malta, from that island, where they have had their principal residence for a long time, and of which the sovereign power belongs to the order, but feudatary to the king of Sicily. This island was gifted to them by the emperor Charles V. after the famous island and city of Rhodes, the antient seat of the grand-master of the order, was conquered from them by the Turks ^d. We had many of those knights here; and their lands are named St. John's lands or crofts at this day, and are in effect the same as temple-lands.

20. The institution of the order of St. John, or the knights hospitalers.

^d Vertot, l. 1. c. 9. p. 509. ann. 1530.

^e Vertot hist. des chev. liv. 1. p. 62. et p. 231.

THAT these were religious orders, appears from their institution and founder: They were founded by the pope, and those who were received into the order entered into the ordinary vows of religion, to which all religious orders are subject, *viz.* chastity, poverty, and obedience to their superiors ^e. The business indeed of the first rank of these orders was military, so that they dedicated themselves to a life opposite to the sedentary life of the monks; therefore they may be justly deemed both military and religious orders. They consisted of three ranks, classes or degrees; those of the first were *milites*, knights, or soldiers in a proper sense, the exercise of arms, and warlike exploits against infidels being their only occupation: into this rank none but persons of truly noble descent were received. The second were the chaplains and priests belonging to the order: and the third were the serving brethren: these were assistant to the knights in the wars, and came afterwards to be called *Esquires*, and originally were in the meanest station, and only concerned themselves in the servile part of taking care of the infirm and sick people, or the like ^f; but thereafter the title of Esquire became preferable to that of gentleman, as it is at present.

21. The knights templars and hospitalers were of religious orders.

^f Id. liv. 1. p. 73.

THOSE orders were exempt from the jurisdiction of the bishops of the dioceses where they resided, and immediately subject to, and under

22. The privileges of those orders;

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whether are
their lands
deemed ec-
clesiastical,
or lay fees.

der the protection of the papal see; and, for their great services to the Christian princes in their expeditions to the holy wars in Palestine, as the land of Judea was then called, and the neighbouring countries, they were indulged great privileges, and, among others, their lands were freed from payment of tithes ^a.

^a Id. liv. 1.
p. 146.

THAT the templar, and hospitaler lands, were esteemed with us ecclesiastical benefices, might seem, from the lordship of Torphichen's being excepted from the annexation of church-lands to the crown ^b; for, after the reformation, when those knights were suppressed here, a considerable part of their lands was erected into that temporal lordship, in favour of Sir James Sandilands, prior of the order in this kingdom, ancestor to the present lord Torphichen; and therefore, unless there had been such exception, it may be thought, that they would have fallen under the general annexation of church-lands. Farther, in the act declaring the superiority of church-lands to belong to the crown ^c, mention is made, among others, of lands belonging to *preceptories*: now this was the common denomination of the benefices belonging to the knights hospitalers, and which were likewise called *Commanderies* ^d, terms equivalent to priories; therefore it would seem, that they ought to be esteemed church-lands: however, the lords of session found, that, in the questions touching designations of glebes, they are not to be reckoned church-lands ^e; and further, that they do not fall under the general annexation of church-lands to the crown ^f; and indeed, in the assumption of the thirds of all benefices, for the maintenance of the ministers ^g, those lands were not understood to be comprehended: this shows, that they were not looked upon as ecclesiastical benefices, and that statute, being very recent after the reformation, puts it beyond question, that they are to be regarded as lay-fees, in every respect, tho', in their original state, they were undoubtedly ecclesiastical benefices.

^b P. 1587.
c. 28.

^c P. 1633.
c. 14.

^d Vertot. hist.
des hosp. liv.
1. p. 76.

^e Fount. Feb.
12. 1698.
Duncan.

^f Id. Feb. last.
1700. Ross.
^g P. 1567.
c. 10.

23. Hospi-
tals, and their
administra-
tion.

HOSPITALS, or houses for entertainment of poor or infirm people, are not properly ecclesiastical or religious houses; but, being under the inspection of the church, and subservient to these uses to which a fourth of the church-revenues was antiently applied, they came, in some measure, to be esteemed ecclesiastical benefices; and therefore it was thought necessary to make an express exception of them in the act of annexation of church-benefices: they are called *maisons de Dieu* ^h, or alms-houses, and differ according to the several uses for which they were founded. This may account for the exception, just mentioned, of the lordship of Torphichen from that act, that it was only to prevent disputes, and not upon supposition that, without such exception, the same would have fallen under the act.

^h D. P. 1587.
c. 28.

THE administration of hospitals ought not to be continued in the same person's hands, above three years together, by the canon law ⁱ: they were, by our law, to be visited by the lord chancellor, and ordinary or diocesan bishop, who were to inquire into their foundations, and cause the regulations in them to be observed; and, where the foundations were not extant, they were presumed to have been for the use of the poor, and the rents of them behoved to be applied for that purpose. Several of the hospital-lands were feued out, or

ⁱ Conc. trid.
sess. 15. de
reform.

set

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set in tack for a small duty, which abuse was to be rectified in time coming by our old statutes^a.

^a P. 1457.
c. 69.
P. 1466.
c. 10.
P. 1587.
c. 63.
^b P. 1587.
c. 29.

THE lands and revenues belonging to hospitals were excepted from the general annexation of church lands, "providing they be not dis-
"poned nor applied to any other use^b." This proviso, I conceive, does not concern feus of those lands anciently granted, which are excepted and reserved by another special clause in the same act; and therefore it can only be meant of the rents of these lands that were not feued, viz. that the same shall be applied in favour of the poor, or others for whom they had been destined, and to no other use.

BENEFICES belonging to universities, colleges, and schools for education of youth, are of a similar nature, and are excepted from the general annexation. The professors, or masters, are properly the beneficed persons, because they receive the profits for their own behoof; but they are not comprehended under the statutes that concern the setting of tacks by beneficed persons, which expressly relate to churchmen. Deeds granted by the principal and members of an university or college, are not effectual against their successors in office, but so far as they were, for onerous causes, tending to the good of the university^c; because they are only liferenters, having a power of reasonable administration. The deed of the major part of the members, in a meeting of the university, is valid, unless, by the foundation, some members who consent not have a negative. They may transact concerning a controverted mortification, whereof the event is uncertain and illiquid, but their gratuitous deeds cannot affect the community^d. The superior of a college, for education of youth, was for most part called Provost, *præpositus*, in the same manner as in the case of collegiate churches.

^c July 13.
1669. old
college of
Aberdeen.

^d Jan. 31.
1678. lord
Rofs.

IN mortifications, the will of the donors ought to be observed, and therefore they cannot be inverted to other uses than those to which they are to be applied by the foundations, and they to whom the management is entrusted are accountable to the churches, colleges, hospitals, or others in whose favour they were made. Letters of homing, in times of episcopacy, were to be summarily issued, either at the instance of the incumbents or administrators, or of the bishop of the diocese within which they lay, against the persons concerned, to compell them to employ the pious donations for the uses mentioned in the foundations^e. Whether the presbytery of the bounds comes now in place of the bishop in this respect, may be a question; it may be thought that this being a privilege that does not concern the ecclesiastical administration, it did not accrue to them by the settlement of presbyterian church government in this country: on the other hand, the act 1690, abolishing episcopacy, and the superiority of any office in the church, and the other act of parliament, settling presbytery in Scotland, may imply that all rights and privileges that belonged to the church, except such as depended on the hierarchy or superiority of offices in it, still remained: thus, the designation of manſes and glebes, committed by express statute to the bishop of the diocese^f, devolved in course to the presbytery, without any act of parliament for that purpose; but, so far as I know, the presbyterian

^e P. 1633.
c. 6.

^f P. 1663.
c. 22.

24. Benefices belonging to colleges, and schools for the education of youth.

25. In mortifications, if the end for which they were granted ceases, or is condemned by law, how shall they be disposed of; at whose suit does diligence proceed against persons liable to mortifications.

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church judicatures never have claimed any interest of superintendency to pious donations : whence it is natural to conclude, that the power committed to the bishops in that respect hath not accrued to them.

26. What if the end for which pious donations were destined cannot be answered.

IF the end to which the donation was to be applied cannot be precisely attained, or would be useless, then it may be employed to the like purpose, always observing the primary intention of the donor^a; but if the use to which the mortification was destined, tho' lawful at the time, is thereafter condemned by law, the right of course falls to the king, as being caduciary and vacant, which was the case of popish foundations at the reformation.

^a June 18. 1678. the commissioners of Berwickshire.

27. Execution proceeds for the rents due to universities, schools, and hospitals, in the same manner as for ministers stipends.

THE acts in favour of ministers, for the more easy levying their stipends, are extended to universities, schools and hospitals, for recovering their rents and duties^b; and consequently there can be no suspension of the same, except on consignation, or production of discharges; and in case, at discussing, either the charge shall be found to have been maliciously given, or vexatiously suspended, a fifth part of the sums shall be modified, or taxed to be paid by the party in the wrong^c; and poindings for the same may proceed, by apprising the goods on the ground, without necessity to carry them to the market cross, in the same manner as in the case of ministers stipends^d.

^b P. 1696. c. 14.

^c P. 1669. c. 6.

^d P. 1663. c. 21.

28. Donations in favour of popish societies go to the next protestant heir.

By special statute, all donations in favour of cloisters, or other popish societies, are declared void, so far as concerns them, and fall and accrue to the next protestant heir to the donor at the time when the donation was destined to be effectual^e: this was a reasonable precaution in favour of protestants, who might be wronged by their popish relations.

^e P. 1700. c. 3.

29. How far, by the late British statute, do such donations go to the king or next heir.

By a late british statute, the estates, conveyed by such settlements as were made at that time, are declared forfeited to his majesty^f; but this statute cannot prejudice those protestant heirs who had claimed and asserted their rights upon the former statute; nor does it extend to settlements of that kind to be made thereafter, which therefore must be regulated by our former law, the same not being repealed by the foresaid British statute, but only varied in respect to the settlements of that kind executed at the time.

^f 1 Geo. II. c. 20.

30. Mortifications to popish foundations fall to the king by the reformation, and were annexed.

ALL mortifications to popish foundations, while popery obtained, fell to the crown after it was suppressed: and truly it is to be observed, that the most considerable of them did proceed from our kings, and however they became vacant and caduciary, and therefore justly accrued to the sovereign by his prerogative, as above; but the annexation of them to the crown was the effect of the statute^g.

^g P. 1537. c. 29.

31. Lastly, benefices either elective or collative; the great benefices deemed elective: had our kings right to present to

THE last distinction of benefices I shall mention, is, that whereby they are either Elective, or Collative: Elective, such as were conferred by election; Collative, those which were collated or conferred by the bishop, either in full right, or upon a presentation from the patron. Elective benefices were bishoprics, abbeys, priories, and collegiate churches or provostries. The election in ancient times was by the chapter or convent, pursuant to the pope's presentation. This was complained

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complained of by our sovereigns, as an encroachment on their prerogative, and the freedom of the church: to prevent this abuse, our legislature imposed severe penalties, as banishment and incapacity of church-benefices on those who purchased them from the papal see^a, whereby they were said to commit Baratrie. But the pope frequently assumed a power of conferring such vacant benefices to suitors at the court of Rome, without regarding the king or chapter; so that, for most part, the above remedy proved ineffectual, tho', at the same time, our legislature asserted their privileges and prerogative of the crown, in the above respect, to the utmost of their power; at last the matter was thus settled.

them in times of popery and episcopacy.

^a P. 1481.
c. 84.
P. 1488. c. 4.
P. 1493.
c. 28.

THE presentation or nomination of clerks to prelacies, as bishoprics and abbeys, &c. was declared to belong to the king, and the provision of the same to the pope^b. This is acknowledged to have been a right, faculty, or privilege conferred on our kings by the pope, and therefore all encroachment upon it, by impetrating at the court of Rome benefices whereof the presentation belonged to the king, was severely punished, and the obtainers of the same declared liable to the pains of treason, if they did not relinquish them after they were required thereto^c. It appears from this last mentioned act, that the king had not the presentation to all benefices, and that it was to be declared by an assembly of the clergy, in presence of the lords of council, whether the benefice, procured at the court of Rome, was at the king's presentation or not; and on their declaring it to be such, the pain of treason was to be incurred by the obtainer, as aforesaid: and as to the reserved benefices at the pope's disposal, our legislature followed the foresaid method of punishing those who procured them, as being most prejudicial to the interest of the country, by carrying the money to Rome, without which no grants could be obtained, but where all things are said to be venal.

32. The method of provision to great benefices in times of popery.

^b P. 1540.
c. 125.

^c P. 1488.
c. 4.

THE king was to present to vacant prelacies within three months, and, failing his nomination, the pope might confer the benefices, *jure devoluto*, at pleasure; but still, even after the lapse, the king might present at all times, till the prelate, named by the pope, showed to the king and the chapter, or convent, his bull of provision^d. This is the case of advowsons in England, that if the patron present before the bishop hath collated, tho' the six months are expired, yet the presentation is good, and the bishop cannot take advantage of the lapse^e, as shall more largely appear from my observations upon their law.

33. What if the king did not present to them within three months.

^d P. 1481.
c. 84.

^e Coke 4.
inst. p. 273.

FROM what is above related, touching the settlement of great benefices in Scotland, 'tis remarkable, that our kings have had of old the same privilege of Regale as to most prelacies; that the king of France, with great difficulty, at last obtained, by the concordance with pope Leo X. about the time of the reformation, to nominate bishops and abbots; so that, during the papal domination, our church was intitled to more liberty, and our kings to a greater independency on the court of Rome, than other states that owned subjection to the pope, in matters deemed of a spiritual consideration. Tho' the king presented the clerk to the vacant prelacy, yet it was still esteemed elective,

34. The king of Scotland had the privilege of Regale, in respect of great benefices.

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lective, because the chapter or convent used the form of an election, pursuant to the king's licence or nomination.

35. The method of electing and settling bishops in times of episcopacy.

AFTER the reformation, the right of election of bishops was declared to belong to the dean and chapter, but they behoved to proceed on the king's licence, called *Congé d'eslire*, i. e. liberty to elect, and were obliged to chuse the person named by his majesty, provided he was an actual minister, liable to no exception; so that the presentation or nomination belonged to the king^a. The election, by the canon law, behoved to proceed within three months of the vacancy, to prevent the inconveniencies which might happen through a longer delay^b. The bishop by his election, and the king's assent thereto under the great seal, had right to the spirituality of the benefice, or the tithes, so termed, because, in the canon law, they were esteemed due to the church by divine right. But as to the lands, or other profits, called the temporality of the benefice, the bishop elected behoved first to be consecrated, and, before he entred to the possession, do homage and swear allegiance to the king. The lands were termed the Temporality, because they proceeded from the bounty of temporal men or laics, which could not be esteemed of divine right; and it is commonly thought, that it was on account of the baronies and lordships, which were parcel of the benefices, that the bishops had the privilege of being lords of parliament, tho' this is doubted by others, as above hinted in the case of abbots and priors.

^a P. 1617.
c. 1.

^b C. 41. ext.
de elect.

36. Common churches, their various state.

COMMON churches were so called, because originally, as above, the cure in them was served by the members of the chapters of cathedral churches in common, and the rents belonging to them were appropriated for their livings, by appointing certain portions, called Canonical, to each of them; and when any vacancy happened, the same was supplied by the bishop and chapter, so that they may be deemed elective benefices. After the reformation, these common churches were erected into separate parsonages by the king, in favour of laic patrons, and at last were ordained to be conferred, on presentation of the patrons, to ministers, as benefices of cure^c. Hence we may observe, that, before this statute, the patrons enjoyed those benefices as lay-fees, or *sine-cures*, for their own behoof.

^c P. 1594.
c. 199.

THE bishops, upon re-establishment of episcopacy, were restored to their benefices, with exception and reservation, to the persons interested, of all common churches, pertaining of old to the bishops, and their chapters in common, which were disposed of at any time by his majesty, to whatever person, preceeding the statute^d; and thereafter, when chapters were restored, there is a reservation to laic patrons of the patronages of the same, granted to them by the king at any time preceeding the statute^e; and, at this day, there is no longer any difference between these churches (of old called Common) and other churches. It may be here observed, that such lands, whereof chapters were in possession in common, were declared to belong to these common churches in the act of annexation^f; so that possession was here in place of a right.

^d P. 1606.
c. 2.

^e P. 1617.
c. 2.

^f P. 1587.
c. 29.

AT

TIT. VIII. Commends, Pensions, and Coadjutorships. 13

AT the reformation, many of the bishops, abbots and priors, embraced the reformed religion, and so retained their benefices and places in parliament. Others, persisting in the popish interest, retired, and their benefices were disposed of to protestant lords and gentlemen *in commendam*, who thereby enjoyed the whole fruits of the benefice, and were called Lords Commendators of such bishoprics, abbeys or priories: and, as lords, they had seats in parliament, in virtue of these benefices and dignities, in such manner as the prelates, in whose place they came, were intitled thereto, before the reformation.

37. The state of benefices, upon the reformation from popery.

AT last all the lands, and other temporal interests which belonged to bishops, abbots, priors, provosts, prebends, or other ecclesiastical persons, were by statute^a annexed to the crown, with the exceptions therein mentioned, some of which I have taken notice of, as above. And, as to the purview of this act, in other respects, I have fully observed it, in discoursing of holdings in mortification^b. Such benefices as were conferred to lords of parliament, were afterwards exempted from the annexation, by statute^c; and, upon restitution of bishops, their benefices were restored to them, with certain exceptions of particular feus or tacks, granted in the mean time^d: and again, upon abolishing of episcopacy in Scotland at the revolution, their benefices returned to the crown, but were not annexed thereto^e.

^aP. 1587.
c. 28.

^bSup. tit. 3.

^cP. 1592.
c. 121.

^dP. 1606.
c. 2.

^eP. 1690.
c. 29.

SECTION III. *Commends, Pensions, and Coadjutorships.*

I SHALL here observe, how the case stood as to commends of those great benefices, and pensions out of them, by the canon law, that our law may, in these points, thence receive illustration; and afterwards I shall treat of Union, Disjunction and Dismembering of benefices. This will naturally lead us from those great benefices that were elective, to the smaller ones of parsonages and vicarages, which only remain, and are collative, and to the patronage of them.

38. Commends, and commendators of benefices, before and after the reformation.

COMMENDS were of very ancient use in the canon law, and likewise with us^f. They were originally intended for the good of the church; and in those days they conferred only a power of collecting the revenues of the church, during the vacancy, till it was duly provided. The Commendator was then no more than a depositary of the benefice, and factor as to the rents; and as such was answerable. Bishops might thus commend inferior benefices within their dioceses for six months^g.

^fP. 1466.
c. 3.

^gP. 1466.
c. 3.

BUT afterwards Commends varied very much from their primitive institution, and became equal to a full title to the benefice. They were granted by the pope for life, and, by the express terms of the bulls, the commendators were not accountable for the rents, but retained them for their own use; but bishops could not grant them of that kind^h. This device was found out to elude the law against plurality of benefices, and to enable persons (otherwise incapable to hold the benefice) to receive the fruits and profits, as laics, infants, bastards, &c. and was a politic of the court of Rome to disappoint our king of the privilege to present to the great benefices; for, while they were held *in commendam*, the vacancy still continued. Commends

^hC. 15. Nemo, de elect. in 6to. Reb. prax. ben. tit. de com.

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of this kind were discharged with us of old, even those which were purchased before the date of the act; and whoever procured them thereafter, or held those purchased before, either of secular or religious benefices, incurred the loss of his temporality for life, and the pain of treason; but it was still lawful to the ordinary to commend for six months^a.

^aD. P. 1466.
c. 3.

AFTER the reformation, when many of the churchmen were deprived of the great benefices, or went abroad and relinquished the same; and upon the death of such as conformed to the reformation, it was thought expedient to give them *in commendam*, or as commends to laics, who were acceptable to the government, and instrumental in the reformation; however, that measure did not save those benefices from falling under the annexation, reserving only to the commendators their mansion-houses and precincts, and with exceptions in favour of lords of parliament^b.

^bP. 1587.
c. 28.

39. Pensions out of benefices, before and after the reformation.

As Commends were rights to the whole fruits of a benefice, so a pension is a partial interest in them, without a title to the benefice itself. A Pension is a right to enjoy a certain sum yearly out of the fruits of the benefice, for a limited time, or for the life of the pensioner; they might be granted by the ordinary for necessary causes, with consent of the incumbent, and only for his life, but might by the pope at pleasure for the life of the pensioner: they were truly alimentary, and therefore could not be renounced by the pensioner, unless he had other funds for his subsistence.

PENSIONS were most frequently granted to poor ecclesiastics, but might to laics by the pope; they were for most part imposed on vacant benefices, and behoved to be only of the overplus, leaving sufficient for the maintenance of the beneficed person who should superveen: when imposed on a beneficed person, it behoved regularly to be with his consent, unless the pope's authority intervened; and if, on a benefice in lay-patronage, it required the patron's consent: it must have been a certain sum payable out of the revenues of a benefice, and not a quota or proportion of them; for that were a splitting the benefice, which was not allowed^c.

^cC. 2. ext. de prebend. Garcias de benef. c. 5. § 180. § 367. et seqq.

A PENSION was properly a real burthen on the benefice, and therefore affected singular successors therein. The singular successors were even liable to what fell due in the predecessor's time, after discussing the representatives of the predecessor who were subject thereto: thus it was in effect *debitum fundi*, affecting the benefice in whoever's hands it came; but pensions granted by the pope only had this privilege^d. We received the canon law in this respect, but not to the full extent; for even in times of popery, all pensions out of benefices, secular or regular, without consent of the beneficed person, were discharged; and the purchasers of them incurred the liferent-escheat of their lands, and the pain of treason, in the same manner as in the case of Commends^e. Hence we may observe, that the pope's pretensions here were limited by our legislature.

^dGarcias c. 8. § 291. et seqq.

^eP. 1466.
c. 4.

ALL

TIT. VIII. Commends, Pensions, and Coadjutorships. 15

ALL pensions out of benefices, either granted by the ecclesiastics, or by the king during the vacancy, are excepted from the annexation of church-lands; provided they were authorised, by decree or possession, before the date of the act, but otherwise they were void; they being lawfully made, affected singular successors in the benefice, as they did by the canon law, provided they were clothed with possession in the life of the incumbent, by whose consent they were granted^a: but, after the establishment of episcopacy, it was declared unlawful, for persons provided to bishoprics, to grant pensions of any part of the benefice, to endure longer than they possessed the bishopric^b: but that act does not prejudice the pensions that were declared, by former statutes above referred to, effectual. However, even before that act, ministers stipends were exempted from all tacks, pensions, taxations, and impositions whatever^c.

^a P. 1587.

c. 29.

P. 1592.

c. 139.

^b P. 1606.

c. 3.

^c P. 1593.

c. 166.

COADJUTORS or assistants were frequently adjoined to beneficed persons, who, thro' age, or other impediments, were incapable to officiate: those had a pension assigned them by the incumbent, and were removable at pleasure, when only authorised by the bishop. But the pope, who pretended to have all benefices in his power, created perpetual coadjutors, with a provision of succeeding to the benefice, in case of their surviving the incumbents. Such right gave only a pension and the expectancy of the benefice to the coadjutor, but the incumbent still remained the beneficed person; for, without his crime or consent, he could not be deprived^d.

^d Car. par. 4.

c. 5. § 16.

et seqq.

WITH us, coadjutors or helpers are in use; but where the incumbent will not, or cannot consent to a pension thro' incapacity, it behoved to be adjudged, by decree before the lords commissioners for plantation of churches, because our ecclesiastical judicatories have no power over benefices or stipends; and how far the court of commission is empowered to award such pensions, is a great question, since they are only authorised to modify and local stipends to parish-ministers, which coadjutors are not. However, in consideration of the largeness of a parish, and the weight of the charge, which a single person is not capable to undergo, so that a perpetual helper will be necessary to discharge the whole parts of the ministerial function, the court may modify a large stipend, with the burthen of a certain proportion of it to a coadjutor yearly: this they lately did, in the case of a very extensive parish, and a large fund of tithes; the minister's former use of payment having been 1728 merks, they modified 2000 merks, as a constant yearly stipend to the pursuer and his successors in office, with the burden of 500 merks yearly to an assistant, preacher or minister^e.

^e June 6.
1750. minister of Ardmurchan.

HELPERS cannot be admitted with a provision of succeeding to the benefice, unless the patron concur, whose privilege cannot be prejudiced without his own consent; and even tho' he and the parish should concur, and the incumbent consent, such settlement would seem repugnant to law, which reprobates all transactions that make way for the *votum captandæ mortis*, besides other obvious inconveniencies; and therefore, for most part, coadjutors only serve the cure with us, by agreement with the incumbent, if he is capable to make it, and are removable

40. Coadjutors or assistants to ministers. Pensions assigned to them.

41. Can the court of commission make provisions in settlements for such assistants.

42. Assistants cannot be settled, with a proviso of succeeding on a voidance.

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removable at his pleasure; but otherwise the presbytery must supply his deficiency, as in the case of a real vacancy.

43. Colleague ministers in single charges; how far to be allowed.

A PRACTICE prevailed in our church-judicatories, of ordaining a colleague-minister, in parish-churches of a single charge, where the incumbent had become incapable to officiate: this was done in some instances, and approved by the general assembly, on appeals against them. They always required the consent of the patron and incumbent, and a concurrence of some elders and heritors, as in the case of an original settlement: the person thus ordained performs the whole function of the parish-minister; and, on the death of the original incumbent, becomes sole minister of the parish, and in the mean time, till that period, enjoys such parts of the stipend, or fruits of the benefice, as is agreed to by the incumbent at the settlement.

As to such settlements already made, there is no doubt of their validity; because this is supposed, in the late statute, approving the scheme for providing the widows and children of ministers, since it allows colleague-ministers the benefit of acceding thereto on certain terms, but it by no means authorises them in time coming; and accordingly the general assembly 1744, since the date of that statute, reversed, on an appeal, the sentence of a presbytery settling a colleague-minister, tho' it was with the consent of the incumbent, patron, and all the elders and heritors (except one heritor) and the body of the people^a. It certainly is an absurd practice, inconsistent with the nature of the thing, that a single charge, already supplied, should admit of a settlement, as if there was a vacancy. It is against the express provision of the canon law, unless the pope's authority is interposed, who, by the plenitude of his power, is not tied to any regulations by the canons as to settlements; wherefore, it is highly probable, our church judicatories will abstain from such settlements in time coming.

^a The case of the parish of Pitfargo.

SECTION IV. *Union, Disjunction, new Erection, and Transportation of Churches.*

44. The several kinds of union of benefices of old.

THE greater benefices were made up, in a great measure, of small benefices United or Annexed. Union of benefices was threefold by the canon law; first, where two or more benefices were united, and incorporated into one another, so that the privileges of all were competent to the united parish, into which all of them were sunk, and a new church erected in place of them. Such union of great benefices, as bishoprics, abbeys, &c. could only be created by the pope; nor did such power fall within the province of his legate^b: but inferior benefices, as parsonages, &c. may have been united by the bishop, within whose dioceses they lay, with consent of the respective patrons.

^b Cap. 4. ext. de off. legat.

SECONDLY, when a smaller benefice was annexed to a greater, so as to become part of it, in this case, the parish annexed lost its title and privileges, and was no more to be considered than any other part of the benefice to which it became accessory: this was frequent, in order to raise great benefices of bishoprics, abbeys, &c. Those annexed churches becoming part of their revenues, were termed Men-
fal

TIT. VIII. Union, Disjunction, &c. of Churches. 17

sal or Patrimonial Churches. The cure in them might be served by a temporary curate, or by a perpetual one, called a Vicar: where the vicar behoved to be for life, by the foundation or terms of annexation, it remained still a separate benefice, so far as concerned the vicarage, and the annexation affected only the parsonage, which was incorporated into the great benefice. Such union might be made, during the vacancy, by the bishop, with consent of the chapter; but if the benefices annexed were of laic patronage, the annexation could not proceed without the consent of the patrons^a. And it is observed by Sir George Mackenzie, that our kings, and other laic patrons, with the king's consent, were in use, of old, to bestow the tithes of whole parish-churches, of which they were patrons, on religious houses, whereof he had seen many instances in old charters, and he sets down one as an example^b.

^a C. 30. ext. de prebendis. c. 4. ext. de off. legat.

^b Observat. on act 29. P. 1587. in fine.

^c P. 1471. c. 43.

ALL such unions or annexations were, of old, discharged with us in time coming, and parishes then of late united to bishoprics, abbeys, or priories, ordained to be disjoined, and reponed to their old foundations; with liberty only to lay-patrons to purchase annexations of benefices to secular colleges, founded, or to be founded, by them^c. Notwithstanding this statute, vast numbers of inferior benefices were annexed to those prelacies; and it appears, that it was frequent at the time of the statute which gave occasion to it, in order to prevent the like abuses in time coming, such annexations being declared contrary to the common good; but it seems not to have had the desired effect, since, at the time of the reformation, the greatest part of parish-churches had become accessary to these great benefices. This kind of union did likewise take place, where an inconsiderable parish was annexed to a greater, and became accessary to it; and divine service was only performed at the church of the parish to which the same was annexed; and frequently, by the terms of the annexation, the cure was to be supplied by a perpetual vicar, and, in such case, the parsonage, thus enlarged by the union, became, in effect, a sinecure; for the parson needed not concern himself with the charge, which was always to be supplied by the vicar: and often likewise persons addicted to devotion mortified lands for the maintenance of a vicar. Hence divers parish-churches were both a parsonage and vicarage, as above; and we find that, next to the parsons lands, glebes were to be designed out of vicars lands^d.

^d P. 1593. c. 165.

In the third place, parish-churches were united, only to the effect they might be conferred to one person, but so as both parish-churches were still kept up, and one of them served by a vicar or curate. The intent of this kind of union was to avoid the laws against plurality of benefices.

^e P. 1581. c. 100.

By our present law, every parish-church must be provided with its own minister^e; and therefore, as there is no longer place now for annexation of parish-churches to prelacies, which were frequent of old; so, as to union of parishes to one another, which sometimes happens, it does not alter the case in point of law, whether the privileges of both are communicated by an intire union, as in the first kind of union, or if the privileges of the one are sunk into the other, and

45. The case of union of churches at present.

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become necessary to it, as in the second kind; for the parishes united, or annexed, are to be esteemed as if they had been originally one.

46. Union, or annexation of parishes at present, how accomplished, and its consequences.

ANNEXATION, or Union of parishes at present, is made, where the tithes of any one of them alone cannot afford a sufficient maintenance to the minister; but if the parishes are very large in extent, or for other causes cannot be commodiously united, the union cannot proceed; and the ministers of the respective churches must rest satisfied with the tithes of the same, tho' ever so small, till they are otherwise provided; since the superplus tithes of one parish cannot be localled to make up the deficiency in another: for the statutes, touching the modifying stipends to ministers, expressly refer to the tithes of the parish where they serve the cure, as the only fund of the same. There is indeed a scheme approved by the last general assembly, for augmenting the maintenance of such ministers whose benefices cannot afford them sufficient livings according to their estimation. This is intended to be laid before the parliament, in order to procure a statute authorising the same, the success of which design, if the same shall be prosecuted, I shall not pretend to divine, or by any opinion presume to anticipate the judgment of the legislature: but there is great opposition formed against it by the land-holders in Scotland, as an invasion upon their interest, since generally they have purchased the superplus tithes; and therefore the great question is, where to find a fund for such augmentation? If the churches united have different patrons, they are to use their rights of presentation to the united church by turns, or *alternis vicibus*^a.

^a P. 1617.
c. 3.

THIS union with us can only be made by decree of the commission for plantation of churches, &c. and needs not the consent of three fourth parts of the heritors, as in disjunctions is required, because they have no civil concern in point of interest; and a small inconveniency, as to the distance of the church must be dispensed with, in order to a comfortable settlement and living for a minister: and tho' such consent is expressly required to the transportation of the church from one part of a parish to another, yet here the court, having power to annex the two parishes without it, may likewise determine where the church of the united parish shall be most commodiously placed^b. If there were manse and glebes in all the parishes, when in a separate state, they wholly belong to the minister of the united parish, as the temporality of his benefice, and his right to the tithes or stipend, which is the spirituality of the benefice, is the same as in other parishes, and as if the parishes united had been originally one. But tho' a minister have one or more glebes that extend to four acres of arable ground, and much more than would be grass for a horse and two cows; yet he may still insist for the designation of grass to a horse and two cows, upon the supervenient statute, which gives ministers that privilege, or 20 l. in lieu of it, over and above their glebes; and therefore, whatever is the extent of their ancient glebelands, it cannot exclude them from it^c.

^b July 18.
1750. Kirk-
newton.

^c P. 1663.
c. 21. Dir.
decis. 256.
Jan. 1734.
Mr. Farquhar
Bethune.

47. Disjunction of benefices; how the case stood of old, and

As the union of parish-churches to great benefices was prejudicial to the interest of religion, so the disjunction of them was beneficial to it. By the above-quoted old statute, such parishes ought to have been

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^aP. 1471.
C. 43.

been disjoined, and restored to their primitive foundations^a. After the reformation, most of the old foundations of benefices were either lost or abstracted: however, the commendators of those prelacies, in many instances, resigned, in the hands of the king, parish-churches, to the effect that they might be disjoined, and erected into separate benefices, under the patronage of the persons in whose favour they were resigned: these parishes were termed Feudal, because thereafter they were, in a manner, to hold of the patron, and to depend on him.

how at present.

^bP. 1707.
C. 9.

THE disjoining of too large parishes, is the privilege of the fore-said court of commission, which takes place, where the ancient limits of the parish admit of a division, the tithes being sufficient for two ministers: but in this case the consent of three fourths of the heritors of the parish, conform to their valued rent, must be obtained to the disjunction^b. This was thought reasonable, because they have great interest in purchasing the free tithes: but there is no mention here of the patron's consent, tho' he seems to be greatly concerned in such questions, since the superplus tithes belong to him. A disjunction of parishes from great benefices, is in some sense universal now; because our law has taken care to provide all parish-churches, whether parsonages, vicarages, or stipendiary, out of the tithes of the parishes, in whose hands soever they are, (as shall appear afterwards) and the old statute above referred to^c, ordaining all churches, annexed to prelacies, to be provided with ministers and sufficient livings, is a disjunction of them all to that effect.

^cP. 1581.
C. 100.

ERECTION of new churches within old parishes, does likewise require the same consent of the heritors; for that is in effect a disjunction: in those disjunctions or new erections, the patronage of course does belong to the patron of the old parish; because the tithes to which he has right must go to endow them; but where such new erections or provisions to second ministers proceed on voluntary contributions, it naturally follows, that the patronage ought to be adjudged to the contributors; but, unless they have got it reserved to them in the erection, it may seem to accrue to the patron of the parish where the new erected church is situated, as is the case of the patron of the church whereto a second minister is provided^d; but it is otherwise, as I shall have occasion further to remark hereafter.

48. Erection of a new church; to whom does the patronage of it belong.

^dNov. 18.
1680. town of Haddington.

THE transportation of churches happens, where it is expedient to build the church in another part of the parish: this ought to be with consent likewise of three fourths of the heritors, as they have an interest, that the church be conveniently situated for their accommodation, and such transportation can only be made by authority of the commission^e.

49. Transportation of churches.

^eD. stat.
P. 1707.

PART of a parish, on some occasions, is dismembered from one parish, and united to another, *quoad sacra* only, *i. e.* in respect to divine service. This is done, where it is more commodious for the inhabitants of the dismembered part to attend the ordinances at the neighbouring parish-church than their own: it only subjects them to the cure and charge of the minister of the adjacent parish; but, in all

50. Annexation of a part of a parish, *quoad sacra*; it does not alter the case as to questions of civil right.

questions

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questions of a civil concern, it remains still a part of the same parish, of which it was formerly before the annexation; and the heritors therein are not bound to contribute to the repairs of the church or manse of the parish, to which the lands are united in that manner^a.

^a July 13.
1748, Park.

51. How far the opinion of presbytery or synod requisite in the union &c. of parishes.

SOMETIMES, in actions touching union of parishes, new erections and disjunctions, dismembrations and transportations of churches, the opinion of the presbytery or synod, within which they ly, is desired by the court, because they are presumed to know best, if it is expedient to make them; but their concurrence, or recommendation, is not necessary.

SECTION V. *Collation and Patronage of churches, and the Settlement of Ministers.*

52. Collative benefices, and particularly parish-churches; collation and institution, the procedure in it.

HITHERTO I have discoursed on elective benefices, and matters relating thereto, and now proceed to the other branch of the above division, which is that of collative benefices: all parish-churches, by the canon law, were collative, *i. e.* were collated or conferred by the bishop, either in full right, *pleno jure*, or upon presentation from the patron, without election by the people. Collation is either voluntary, where the bishop is not limited to any particular person, as when he collates in his own right, *pleno jure*; or necessary, when he is bound to collate the benefice to the person presented by the patron, which last is more properly called institution than collation^b; tho' 'tis pretended by some, that, in our stile, the entering the person collated to the possession of the church or benefice, is called Institution^c.

^b Rebuff.
prax. benef.
tit. de present. et inst.
et tit. de collatione.
^c Mackenzie's
inst. lib. 1.
c. 5.

By collation or institution, the bishop confers or bestows the benefice, and grants precept or mandate, to any ecclesiastic in the diocese, to give investiture or possession of the benefice to the person intitled to it. This was ordinarily executed by the arch-deacon, and is termed Induction, and, improperly, Institution. The solemnity, is the delivering him the bible and keys of the church, and entering him within the church; and thereon an instrument of possession is extended by a notary. This form of induction is similar to our seifins in lands.

53. The manner of settlements of ministers with us.

THE whole settlement is performed with us at present, by the presbytery's admitting the candidate, and declaring him minister of the church and parish to which he is called or presented. This is done within the church, to the cure of which he is to be entered: and if he is only a licentiate in divinity, or probationer, he is ordained a minister, or vested with holy orders, by imposition of the hands of the presbytery; at the same time that he is admitted to the function of the ministry, he is settled incumbent in the parish-church. It is the settlement that completes the presentation, and gives the presentee right to the benefice or stipend.

54. Collation in times of popery and episcopacy.

COLLATION, strictly so called, took place, where the patronage of the church belonged to the bishop of the diocese where it lay, as in mensal or patrimonial churches, and in others, when the patron did

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did not use his privilege. The bishop behoved to collate within six months of the vacancy or lapse, otherwise the right of provision devolved to the archbishop, and on his default, in times of popery, to the pope, and, while episcopal government obtained, to the king's privy-council^a. Before collation, the bishop caused serve an edict, advertising all persons to object, why the candidate ought not to be settled.

^aP. 1612.
c. 1.

WITH us, in such cases, at present the patronage of menſal churches belongs to the king, and they are planted as other churches under patronage; and, after the laſe, the preſbytery commonly makes the ſettlement, upon a call from the majority of the proteſtant heritors and elders of the pariſh, in a joint meeting, after the manner of the act of parliament 1690, but are not bound to that method, nor were even when that act was in vigour; for it leaves them to plant churches, *Tanquam jure devoluto*, with the ſame freedom that biſhops might. The ſovereign rule is, to make ſuch ſettlements as tend moſt to edification, and in that view to regard the inclinations of the people, or not, as ſeems moſt expedient. The act of aſſembly 1732 being now aboliſhed, preſbyteries are at full liberty, when the patron does not uſe his privilege^b; and which is expreſsly declared to be their right by the late Britiſh ſtatute^c; for it provides, that, in caſe of a laſe, they are to preſent a qualified perſon, *Tanquam jure devoluto*. At the ſame time that the miniſter is admitted to the benefice, he is put in poſſeſſion.

^b Act of aſſembly 1734.
^c 10 Annæ,
c. 11.

55. The procedure, in order to a ſettlement at preſent.

PARISHES are planted on preſentation from the patron, when, in place of a regular call from the elders and heritors, the preſbytery proceed to ſettle the preſentee, or perſon preſented to them by the patron, miniſter of the church to which he is preſented. Patronage of churches is ſo called, becauſe the church is under the tutelage and protection of the patron; and if the origin and inductive cauſe is conſidered, patronage will be found to have been introduced for the great good and advantage of the church. It is originally founded in the civil law^d, but immediately derived to us from the canon. It is otherwiſe termed *Jus advocacionis*, a right of advocacy or advowſon; becauſe the patron has the right to call or preſent to the benefice, or that he is advocate and defender of its privileges; as likewiſe, it is called *Jus donationis*, a right of donation^e, becauſe the benefice is at the gift of the patron. Patrons are frequently termed in the canon law Defenders of the church; for they were to defend it from intruders, and its revenues from dilapidation^f. Patronage, from its principal effects and privileges, may be defined "A right of preſenting a qualified perſon to a vacant church or benefice, and of diſpoſing the rents or ſtipend, during the vacancy, for pious uſes."

^d Novel. 57.
c. 2. Nov.
123. c. 18.

^eP. 1587.
c. 67.

^f C. 14. c. 23.
ext. de jur.
pat.

56. Patronage of churches; its different names or epithets.

THE right of patronage is of itſelf perſonal, but for moſt part is annexed to baronies, or other tenements, in which caſe it paſſes therewith by infeſtment. It was ſaid in the canon law to be *ſpirituali annexum*, annexed or incident to ſpiritual things, as ſubſervient to the cure of churches and charge of ſouls; therefore it could not be ſold, but either with the tenement to which it was united, or *per univerſitatem*^g, and queſtions about it were only cognoſcible in the ſpiritual or eccleſiaſtical courts. But now it is a patrimonial right in

^g Cap. 16. ext.
de jur. pat.

57. How far patronage conſtituted by infeſtment, or what if it fall to heirs-portioners. It was eſteemed ſpirituali annexum. It is

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at present a
patrimonial
interest.

every respect, and by the canon law it passed to co-heirs^a. With us, if it is considered as an indivisible right, the same behoved to be adjudged to the eldest heir-portioner, by the privilege of her birth, without any recompense to the rest, since originally it afforded no constant patrimonial interest, in which case only contribution is due from her to her sisters for indivisible subjects, as has been already observed of superiorities of lands holden in feu-farm^b; but I can see no reason why it should not belong to them all, and be exercised by turns, as in the canon law, and the eldest only to have the first presentation; more especially, since there is incident to it a right of the tithes, by the statutes 1690 and 1693, of which more afterwards.

^a Cap. un. de
jure pat. in
6to.

^b Sup. tit. 4.

^c B. 3. tit. 5.

58. Patronage either ecclesiastical or laic; these differed of old as to their privileges.

PATRONAGE was either Ecclesiastical, or Laic. Ecclesiastical, that which belonged to a churchman in the right of his benefice; for example, to the bishop of one diocese over churches within the diocese of another. Laic, that belonged to laymen, or to clergymen, otherwise than on account of their benefices. The differences between them were, first, That ecclesiastical patronages were entirely subject to the pope's pleasure, who might freely collate the benefice without taking any notice of the patron; whereas, in a lay-patronage, the pope's grant was null, as surreptitious, unless it bore an express proviso of the patron's consent being procured^d. 2. Churchmen might present at any time within six months of the vacancy's coming to knowledge; whereas a lay-patron had only four months, from the time of his knowledge of the vacancy^e. 3. Laymen might alter, and after one present another, and the Ordinary, *i. e.* the diocesan bishop, had his election, which of them to prefer; whereas a churchman could only present one, and behoved to adhere to his first choice^f.

^d C. 28. ext.
de jur. pat.

^e C. 5. ext.
de concess.
preb.

^f Cap. 5. et
29. ext. de
jurc patron.
cap. un. de
jure pat. in
6to.
^g Reg. maj.
lib. 1. c. 2.

59. The patron has six months to present; how is this understood; and may he vary his first presentation, and present another.

WITH us, of old, lay-patrons were limited to four months^g; and no doubt we followed the above prescription in the canon law, in this and most other particulars, in times of popery. Indeed all patronages seem at present to be laic, for those which belonged to the bishops do now belong to the king, and the patronages annexed to popish foundations belong either to the crown, or to titulars and lords of erection; and now, by express statute, laic patrons present within six months after such time as the death of the last incumbent may come to their knowledge^h. Wherefore with us, as to the time of endurance of the privilege of presenting, it is according to the prescription of the canon law in ecclesiastical patrons, *viz.* six months in every case. As to the liberty of a patron to vary his presentation, I doubt not, but a patron may alter his choice, after signing a presentation, and the presentee's acceptance, before the presentation is offered to the presbytery for their concurrence; because, till then, there cannot be understood any *jus quæsitum*, or right acquired to the presentee; and, to prevent simoniacal pactions, the patron, by the canon law, could not, by any agreement, be effectually bound to present a particular personⁱ: but, after the presentation and acceptance is received by the presbytery, it would seem, that the presentee is intitled to the settlement, and that the presbytery must proceed to it, so that the patron cannot, without his consent, recal the presentation

^h P. 1567.
c. 7.

ⁱ Cap. fin.
ext. de concess.
preb.

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tation of him, and give it to another, but must abide the judgment of the presbytery touching the settlement.

^a 10 Annæ,
c. 11.

THE late British statute mentions the time to be six months after the vacancy^a; but that must be interpreted conform to our old law, since patrons are restored to their antient right of presentation; so that it can only commence from the patron's probable knowledge of the vacancy, which was likewise the prescription of the canon law; and, in this case, the rule of chancery, *de verisimili notitia*, may be applied, that the patron's knowledge is presumed, after such time as advice could have been had from the place where the incumbent died, to the place of the patron's residence.

^b C. 26. ext.
de ju. pat.
caus. 16.
quest. 7. et
ibid. gloss.

THE right of patronage had its rise from the encouragement thereby given to build and endow churches: therefore one who gave the ground for building a church, or who built or endowed it by the authority of the bishop, might acquire or reserve to himself the right of patronage of it, under the provision after-mentioned; but if once the church was consecrated, one could not acquire the right of patronage over it; because that were to impose a servitude upon a thing sacred, and therefore the patronage must be reserved to the donor, his heirs and successors in the mortification. One that bestowed the ground for building a church could not acquire the patronage, nor he that mortified a fund for its endowment till it was built, but the right accrued to all of them, as soon as the building was perfected^b. At present, a church cannot be erected anew, without a decree of the lords of commission, who, at the same time, adjudge the right of patronage to whom they find it justly belongs; and no doubt such reservation will be sufficient ground for adjudging the patronage to the mortifiers. Different persons concurring to the founding, building and endowing a church, become joint patrons equally, tho' they had contributed unequally; because they are presumed to agree that all shall have equal interest, by admitting one another to contribute: in such case co-patrons behaved to join in presenting the same person, and, if they disagreed, the bishop made his election whom to prefer: but, with us, joint patrons present by turns, as is before observed^c.

^c P. 1617.
c. 3.

THE right of patronage imports Honour, Interest, and Burdens. The honourable part consists in the right of presentation. This of old proceeded by real exhibition of the person to the bishop, requiring him to admit the presentee; and hence it was called Presentation: but afterwards no more was necessary than to produce a presentation, duly signed by the patron, with an acceptance from the presentee, when the presentation was offered. A presentation is "The patron's offer, in writing, of a qualified person to the ordinary, *i. e.* the diocesan bishop, now the presbytery, to be admitted minister of a vacant church:" it contains a disposition, by the patron, to the presentee, of the fruits of the benefice or stipend, and a requisition to the proper superior, or church-judicatory, to institute or admit him to the church and benefice accordingly. It was formerly made to the bishop of the diocese, and, if he refused the presentee, appeal lay to the archbishop, who might be compelled, by letters of horning, obtained

60. How patronage originally acquired over churches; what if more persons concur to the founding, building, and endowing a church.

61. The patronage imports honour, interest, and burdens. The honourable part, the right of presenting; how did that proceed at first, or does at present.

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tained upon application to the council, to admit the presentee, in case he had no just grounds of refusal ^a.

^a P. 1612.
c. 1.

Now the presbytery is in place of the bishop, from whom appeal lyes to the synod, and from them to the general assembly; or directly from the presbytery to the general assembly, in case there is no diet of the synod between the judgment of the presbytery and the sitting of the assembly, whose sentence is final as to the receiving or rejecting the presentee ^b. In case of a final rejecting of the presentee who was legally qualified, the patron has as much of the six months thereafter, to present another, as was to run at the time of the first presentation; because such presentation was a legal interruption of the six months, and the lapse cannot incur against him while it is in dependence; and, in the mean time, he retains the whole fruits of the benefice, till the settlement is made upon his presentation ^c.

^b P. 1567.
c. 7.

^c P. 1592.
c. 117.
P. 1612.
c. 1. 5 Geo. I.
c. 28.

62. What remedy has the patron, if the church-judicatories reject his presentee, duly qualified.

If the archbishop was not disposed to comply with the patron's presentation, he behoved to suspend the charge, and then the lords of session were judges of the reasons of suspension, and causes of refusal ^d. But, by our present custom, no such charges are in use. If the presbytery, or other church-judicatory, before whom the presentation comes, do not sustain it, and the patron conceives himself injured by their proceedings, application certainly may be made to the court of session, by suspension, with respect to the stipend or rents of the benefice, that he may get justice done him as to his civil right, whereof they alone are competent to try the validity. There is no reason of difference between the case now, and what it was in times of episcopacy, as to that point of the civil right; but as to grounds of refusal, on account of insufficiency, heterodoxy, or immorality, the lords of session are not judges, but only the church-judicatories, whose right it is declared to be to try the qualities of the person presented ^e, and in that respect their sentence is declared final, by our old statute ^f; but, as to the civil right, the patron has interest to retain the stipends, or fruits and rents of the benefice, in such case; and there must be a remedy to make that right effectual, which can only be by suspending the charge, at the instance of the person settled in opposition to his presentee. A qualified person is an ordained minister, or a licensed preacher, who accepts the presentation, and takes the oaths to the government, which must be done within the six months, or otherwise the right devolves to the presbytery ^g.

^d Feb. 29.
1680. Scot
of Ancrum.

^e 5 Geo. I.
c. 28.
^f P. 1567.
c. 7.

^g D. 5 Geo. I.
c. 28.

63. A simoniacal paction disqualifies a presentee.

It is likewise a qualification in the person presented that he has made no simoniacal paction with the patron, by giving or promising a valuable consideration for being presented; for, in that case, whether such agreement is before or after the avoidance, the presbytery may lawfully refuse the presentee: but it is declared no simoniacal paction to agree with the patron concerning a tack or lease of the fruits of the benefice, provided the presentee reserved to himself a sufficient maintenance, answerable to the state of the benefice ^h. But such paction cannot take place in stipendiary churches, without incurring the guilt of simony, in case any abatement is made from the stipends, constituted by decree of the commissioners; for such stipend is the legal maintenance of the minister and his successors, and such agree-

^h D. P. 1612.
c. 1.

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^a P. 1661.
c. 9.

agreement is void ^a. However, in parsonages, where the incumbent is in the full possession of the benefice, such compact may still be allowed.

IF the patron acquiesces to the rejection of the presentee by the presbytery, the residue of the six months, that remained at the time of the presentation made, commences to run from the time of such refusal, or from the time the appeal is finally disscut, within which he may present another, provided the presentee was an actual minister, or licentiate, and declared his acceptance, or willingness to accept; as likewise he has the residue of the six months, in case of the presentee's death happening after the presentation is offered to the presbytery, because the presentation is a lawful interruption. The presentee may lawfully be rejected, on account of immorality in his life, or error in his doctrine, for which purpose an edict is served before his admission, that all persons having interest may object why the presentee ought not to be settled: but tho' he should be refused on any such account, the patron's right cannot be thereby prejudiced; because he presented one legally qualified in the terms of the statute, and therefore he may present another within six months of such refusal, discounting the time that had run before the first presentation was made. Wherefore the rule is, that if the patron present one, legally qualified, viz. a probationer or minister, who duly accepts the presentation within the six months, he saves his privilege; and if the person presented shall be refused by the church-judicatories, he has the residue of the six months, that remained at the time of his first presentation, to present another, for the church-judicature cannot claim a lapse by their own fault; but if the patron present one who does not accept within the six months, or who is not legally qualified, as not having taken the oaths required by law, or the like, he can only, on the presentee's being rejected, present another within the six months of the vacancy's happening, it being his own fault that he did not present one duly qualified, that accepted within that time, and he cannot thereby prolong the term ^b.

^b 5 Geo. I.
c. 28.

IF the presbytery shall settle a minister, while the patron's privilege is current, without a presentation from him, the settlement is void as to the civil right to the benefice, in case the patron object and offer a presentation, in terms of law, before the expiration of the six months; for tho' the service of the edict is presumed to notify the intended settlement to all persons concerned, yet that is only in order that they may have opportunity to make their objections to the candidate, if they have any; but the patron is not bound to regard those proceedings, and therefore may use his privilege, whether the premature settlement is compleated or not; and for this reason it is adviseable, that it should not be entered upon without the patron's consent, till after the lapse.

64. If the patron acquiesces to the rejection of his presentee, duly qualified, in what time may he thereafter present another, or in case of the presentee's death after the presentation.

65. What if the presbytery settle a minister while the patron's privilege is current.

WHEN the patron does not use his privilege, the right of settling a minister in the church for that time devolves to the presbytery, in which case they plant the church *tanquam jure devoluto*. Indeed, by the late act of assembly ^c, they were bound to proceed upon a call from the heritors and elders, and, after the election, the person named was to be proposed to the congregation before the settlement, that

^c Assembly
1732.

66. A settlement, *tanquam jure devoluto*, by the presbytery.

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tained upon application to the council, to admit the presentee, in case he had no just grounds of refusal ^a.

^a P. 1612.
c. 1.

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^c Assembly
1732.

66. A settlement, *tanquam jure devoluto*, by the presbytery.

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they might object to his life or doctrine ; but now, by repealing this act, presbyteries are restored to their antient liberty^a, as above.

^a Act assembly 1734.

67. What if the patron is not qualified, by taking the oaths to the government, or refuses to take the Formula.

If the patron has not formerly taken the oath of abjuration, he must take it at or before his signing the presentation ; and if he is suspected to be popish, he must take the *Formula*, to purge himself of popery^b, being tendered to him by the sheriff of the shire, or any two of the justices of peace ; and, on his default to take the oath or *Formula*, the right of presentation, for that time, belongs to the king, who may present to the church at any time within six months of such neglect or refusal^c.

^b P. 1700.
^c 3.

^c 10 Annæ,
^c 11.

68. Is the concurrence of the church session, or consent of the people, necessary on a settlement of a parish minister ; and what is expedient to be done, if that is wanting.

THE late statute bears, That the presbytery is obliged *to receive and admit the person presented, in the same manner as persons presented before the making of the act ought to have been admitted*. Now, by the act 1690, the person named, or presented by the heritors and elders, behoved to be proposed to the congregation, to be approved or disapproved by them, and if they disapproved, the presbytery were to cognosce and determine therein : it may therefore be doubted, whether that method must still be followed. I conceive neither people nor presbytery can obstruct the settlement, except upon objections to the presentee's life or doctrine, and that the method in the act 1690 is not now the rule. The Manner mentioned in the British statute must be that which took place formerly, when patrons had the right of presentation, they being restored to their antient right ; and, if it were otherwise, the presbytery would have it in their power to set aside the presentation, upon suggestions from the people, which was not intended ; nor did such method take place when the patrons presented, in the purest times of presbytery^d.

^d P. 1592.
^c 116.

NOTWITHSTANDING that, in strictness of law, the church-judicatories are bound to make settlements of ministers in churches, upon the presentation of patrons, tho' without the concurrence of heritors and elders, or consent of the people ; yet, because such settlements are seldom comfortable, and tend not to the success of the gospel in parishes so planted, they for most part do not make settlements in that way, but require the consent of a sufficient number of the heritors and elders, by way of call or concurrence, and likewise the approbation of the people, if it can be had ; and if such concurrence is not obtained to the patron's presentee, they generally stop settling him, and endeavour to prevail with the patron to pass from his presentee, and present another more acceptable to the parish, which the patron seldom refuses, and in this case the presentee does not seem to have any remedy ; for, whether he is a minister, or licentiate only, he is subject to the rules and orders of the church, in relation to his settlement. At the same time, the opinion the people have conceived, of a right they pretend to have in the choice of their minister, creates great disturbance to the church-judicatories, and occasions long vacancies, and puts the patron, and others concerned, to no small expence, before a settlement can be compassed ; all which would be prevented if such notion were eradicated out of their minds, but which will not be easily done, as it has been allowed to take so deep root.

WHERE

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WHERE patrons have not the right of presentation, as in those parishes, from the heritors of which they received the recompense mentioned in the act 1690, for that right, the method prescribed in that statute must still be followed; because such patrons are not, by the British statute, restored to their right of presentation, but expressly excluded from the same: therefore the settlement must be upon a nomination by the elders and protestant heritors; and, in royal borrows, by the magistrates, town-council and church-session, as they had been in use before the year 1660, with addition of the heritors, in case there is a considerable part of the parish landward, as is provided in the statute 1690; which the late British act does not alter, but leaves in the same state, with respect to such churches, where the patron has not the right of presentation; and this is likewise the rule in churches free of patronage, or where the patron waves his privilege.

69. Where patrons have not the right of presentation, the method prescribed in the act 1690 is the rule for the settlement, as likewise in all other cases where the churches are free, or the patron waves his privilege.

In the case of joint patrons, they ought all to concur in presenting the same person; or, if they present differently, the bishop, by the canon law, had the choice which of the persons presented he should prefer to the benefice, as above hinted. It might rather seem, that, in this case, if they do not all agree upon one person, the case should be held as if no presentation were offered; because the right does not belong to each severally, but to all jointly. But the rule laid down in our statute^a, in the case of union of churches, subject to different patrons, that they present *per vices*, or by turns, is preferable; and, I conceive, applicable even to the case where originally a church hath several patrons, occasioned probably from their joint contribution to the founding, building, and endowing the church, or from other causes; for there is no conceivable reason of difference between copatrons of an united church, and of a church which was always one.

70. In the case of joint patrons, how is the matter ordered by the canon law, and by ours.

In the case of a new erected church in another parish, if it is endowed out of the tithes of the old parish, the patron of that parish-church is intitled to have the patronage of the new one; but, if it is founded, built, and doted by voluntary contributions, the contributors may jointly claim the patronage in the erection before the commission, which has the sole power in such cases: but, if they get it not ascertained in the decree of erection, it may seem, that the patron of the old church hath the title to it, as is the case of a provision raised to a second minister, hereafter taken notice of^b; but of necessity that church is free, and cannot be afterwards brought under patronage, because all parties interested have tacitly past from their claims; and consequently it must be planted in the same manner as by the act 1690 is directed, which still takes place where there is no patron, or where he has not the right of presentation, as is already observed.

71. The case of a new erected church as to the patronage.

'Tis true, the pope, in times of popery with us, and in popish countries at this day, is presumed patron, in every case where the right of another does not appear, and the king succeeds to the pope in such rights; but that is only a presumptive title, and does not hinder a church from being free of patronage altogether; as certainly those churches are free from presentations, where the patrons accepted

72. How far the king, in the right of the pope, presumed universal patron.

^a P. 1587.
c. 28.

^b Nov. 18.
1680. Earl
Haddington.

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cepted the consideration given them by the act 1690, in lieu thereof, as above; and there is no reason, why the like may not hold in the other instances too, above remarked.

73. At what time does the presentee's right to the fruits of the benefice commence.

THE presentation gives right to the fruits of the benefice or stipend only Conditionally, viz. in case the presentee is admitted minister of the parish-church, and only as such he has right to the stipend or rents of the benefice: hence, tho' the presentation bear date before Whitsunday, yet, unless the admission is likewise before that term, the presentee has no right to it^a; for, till the actual admission, the church is void, and the vacant stipends must be disposed of, as the law directs, for pious uses.

^a July 24. 1662. Wemyss. July 9. 1663. Kirkcaldy. Jan. 26. 1670. MacQueen. ^b P. 1690. c. 23.

74. The patron's interest in the benefice; his right to the tithes of the parish, by the acts 1690 and 1693.

AT present, the patron's interest in the benefice, except as to the right of presentation, which is not a pecuniary benefit, but a privilege, is regulated, in great measure, by the act 1690^b; by it the right of the tithes, not heritably disposed, is declared to belong to the patron, with the burthen of the minister's stipend, and future augmentations or new erections; and under obligation to sell to the respective heritors the tithes of their lands, at the rate of six years purchase, where the patron had only right by that act. This is extended to parsonages, and all other benefices of cure, without exception, with this proviso, that, where the minister is in possession of the tithes as titular, he shall continue therein till the patron procure to him a modified stipend^c: this concerns benefices provided to ministers by the old act^d. The grants of patronage, even of old, commonly bore *ius patronatus ecclesie parochialis, cum decimis rectoriis et vicariis ejusdem*; but that only imported a right of presentation to the benefice, and did not constitute the patron titular of the tithes^e. This stile is a vestige of the antient position, that tithes originally proceeded from a grant of the patron to the church, and on that account obtained, or rather reserved the right of presentation to the same.

^c P. 1693. c. 25. ^d P. 1581. c. 102.

^e Jan. 4. 1749. heritors of Kirkpatrick-Fleming.

THE patron's right to the tithes obtains without distinction, whether he accepted the consideration for the right of presentation or not, these being distinct privileges; so that, tho' such patrons, as did accept of the statutory price for that right, stand, by the British act, excluded from presenting, yet they still enjoy the right to the tithes as formerly. Thus, the patron is in effect the beneficed person; but, truly, as his right is qualified, the design of the law appears chiefly to have been, that the heritors might have the privilege to purchase the superplus tithes of their lands at an easy rate; for, before that act, the patrons found always means to procure right to the tithes from the incumbent, and restricted him to a tack-duty, perhaps far under the value of the rents and profits of the benefice; and in this practice they were authorised by special statute^f. By such indirect methods, they had it in their power to exact the whole tithes from the heritors, tho' perhaps a small proportion only went to the minister's use: but now the heritors, by such easy purchase, may have the benefit of the superplus tithes in a great measure themselves, upon obtaining a decree of sale, of which I shall discourse hereafter. If a patron had conveyed all right he had, or should acquire to the tithes, his super-

^f P. 1612. c. 1.

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supervient right, by the act 1690, would accrue to such heritor, and the case would be the same, if he had conveyed the tithes with absolute warrandice.

^a P. 1690.
c. 23.

^b P. 1707.
c. 11.

^c P. 1587.
c. 29.
P. 1633.
c. 14.

By the same act 1690^a, patrons are declared to have right to the feu-duties of all lands holden of their benefices, redeemable by the crown, to whom the superiority of them is ordained to belong, in the same manner as the superiorities of the church-lands, by the act 1633; but where these feu-duties are a part of the minister's modified stipend, or the minister had been in possession of them the space of ten years, or where he has the full benefice, they are declared irredeemable. It may be a question, if the reversion of those feu-duties falls under the late statute, renouncing the reversion of church-lands^b: it indeed expressly concerns only lords of erection, and the feu-duties which belonged to superiorities, annexed to the crown by the old statutes^c; whereas the superiorities, declared to belong to the crown by this act, are not annexed. However, the reason assigned in the act, for renouncing the reversion of these feu-duties belonging to the annexed superiorities, namely, "that it was no profit to the crown, and a lett and impediment to all transactions in relation to the feu-duties," equally holds with respect to those in question: and since the act 1690, in declaring the reversion of such feu-duties to belong to the crown as to the superiority, refers to the act 1633, as the rule, there would seem no doubt, but the renunciation of the reversion must be understood to concern the one as much as the other.

75. Patrons have right to the feu-duties of lands holden of their benefices, (not possessed by the ministers) till redeemed by the crown; is this reversion discharged by the act 1707.

^d *Causa* 30.
Can. 16.
quest. 7.
cap. 25. ext.
de jure pat.
^e L. 5. § 18.
et 19. ff. de
agnosc. et a-
lendis, &c.

^f P. 1693.
c. 25.

THE patron had this interest likewise in the benefice, by the canon law, that, in case he was reduced to poverty, he should be maintained out of the fruits of the benefice, if there was any overplus, more than a reasonable subsistence to the incumbent^d; after the example of a freed-man's being liable, by the civil law, to support his patron in such case^e: but this can take no place in stipendiary churches; because the stipend is only for the maintenance of the minister, and the patron has right to all the superplus tithes, which is a more valuable interest: and, as to others, where the ministers are in the full possession, the patrons may procure them modified stipends, and take the overplus to themselves, in virtue of the statute in that behalf^f.

76. The patron's aliment out of the benefice, by the canon law, in case of his poverty, takes no place with us.

^g P. 1685.
c. 18.

^h P. 1663.
c. 21.

ⁱ Fount.
Dec. 6. 1695.
Lo. W. Dou-
glas.

THE interest belonging to patrons in benefices, during the vacancy, is their right or power of disposal of the vacant stipends, for pious uses, within the parishes. The repairing the fabric of the church, is one of those pious uses to which the vacant stipends are to be applied; and the upholding the manse, during the vacancy, another. If none of these take place, they ought to be employed for the use of the poor, for the building and repairing of bridges, &c. and 'tis in the patron's option to which of those uses they shall be applied^g: only it is specially provided, that the manse shall be upheld, during the vacancy, out of the vacant stipends^h, which therefore the patron cannot refuse to the prejudice of the heritors: but, if the patron has actually destinated them to another pious use, before he is interpellated by the heritors, their claim will be rejected, the matter not being entireⁱ. If the patron fails in this application, he loses his right of

77. The patron's interest in the benefice, during the vacancy; his power of disposal of the vacant stipends to pious uses; the penalty incurred by him on failure.

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presentation for the next vice, by the act 1685; and, by the act 1690, the patron, upon such failure, is declared to lose his right of administration of the vacant stipends, for that and the next vacancy, and the same are to be disposed of by the presbytery: at the time of this act, the patron had not the right of presentation, and so the penalty could not have been the forfeiture of it for the next vice; but now, since he is restored to the right of presentation, I conceive that that penalty, and not the other, takes place, for that restitution must be with all the qualities that affected it; and the act 1690 is repealed, by the act restoring patrons to their right of presentation, so far as concerns the presbytery's power of disposing of the vacant stipends, thereby declared, in the case aforesaid, to belong to them; and indeed they are barred from the same in every other case. Thus formerly, where the patron was popish, the power of administration of the vacant stipends belonged to the presbytery^a, but now it goes to the crown; as likewise where the patron does not qualify himself to the government, by taking the oaths^b.

^a P. 1690.
C. 23.

^b 10 Annæ,
C. 11.

78. Part of the vacant stipends goes to the fund for supplying the widows and children of ministers.

THE act for raising and establishing a fund for a provision to the widows and children of the ministers of the church of Scotland^c, declares each vacant benefice subject to the sum of two pounds ten shillings sterling, for every half year during the vacancy, toward supplying the fund for the above purpose; and which is declared preferable to all other debts and burthens upon the same.

^c 17 Geo. II.
C. 11.

79. How the vacant stipends, within the synod of Argyle to be disposed of.

By special statute^d, the vacant stipends of churches, within the synod of Argyle, were to be disposed of for the education of youth, at the sight of the synod, with consent of the heritors; as likewise, in all cases, if the patron failed to apply the vacant stipends, the administration belonged to the presbytery, for that and the next vacancy^e: but now, by the late British statute^f, the presbytery has no concern in the matter, as just said. And as to the synod of Argyle, the patrons of parishes within it are on the same foot with other patrons; because all patrons, without distinction, are restored to their former right of presentation, and power of disposal of the vacant stipends for pious uses, Any statute or custom to the contrary notwithstanding.

^d P. 1690.
C. 24.

^e D. P. 1690.
C. 23.
^f D. 10 Annæ,
C. 11.

80. Are the vacant stipends of churches, whereof the patronage belongs to the crown, subject to a disposal for pious uses.

THE act concerning the disposal of vacant stipends, which was made during episcopacy^g, does not extend to churches whereof the crown was patron, nor to mensal or patrimonial churches belonging to bishops. But it may justly be doubted, if this is not altered by the above-quoted late British statute, which bears, that the king may dispose of the vacant stipends of parishes that belonged to the bishops, and whereof the patronage is thereby declared to belong to the crown, for pious uses, "in the same way and manner, as is the case of other "patronages belonging to the crown:" this plainly supposes, that, in all cases, the vacant stipends of churches, of which the crown is patron, are to be disposed of for pious uses. There can still be less doubt, as to the vacant stipends of such parishes, whereof the patronage belonged to persons attainted on account of the rebellion 1715, and declared to belong to his majesty by statute^h; for, to be sure, by the patronages being vested in the crown, the condition of employing

^g P. 1685.
C. 18.

^h 5 Geo. I.
C. 21.

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ploying the vacant stipend could receive no alteration; for that must follow the patronage, in whomever it is vested: the same rule holds with respect to patronages that belonged to persons attainted of high treason for the rebellion 1745, vested in the king by the late act^a.

^a 20 Geo. II.

THE Burthen incumbent on patrons, originally, was the taking care of the fabric of the church, and defending the benefice against intruders, and its revenues from dilapidation: at present the heritors of the parish must keep the church in repair, if there is not vacant stipends sufficient for the purpose; and, as to the revenues of the benefice, it has been already observed, that the superplus tithes belong to the patron himself, in stipendiary churches; and that, in parsonages, he may agree with the incumbent, and take from him a right to the tithes, leaving him a reasonable maintenance, according to the condition of the benefice; or insist in an action for having a stipend modified, and allocate to him out of the tithes. In parsonages, where the incumbent is still in full possession of the tithes, he is bound to repair the quire of the church, and if it is not distinguishable from the body of the church, a third of the whole stent, or rate for repairing the fabric of the church, must be born by him, or his tacksmen^b, and the remainder by the heritors. It may be thought that the patron, who has right, by the late statutes, to the superplus tithes, is liable to this burthen, which was incumbent upon the parson, since it was on account of the tithes that the parson was subject thereto: but I conceive he is not; because it is none of these burthens to which the patron is subjected by the act 1690, on account of that right; and the reason may be, that it is the heritors own fault if they allow the patron to hold that right, since they have the privilege, by the same statute, to purchase from him the superplus tithes, at the easy rate of six years purchase, with deduction of the king's annuity.

^b Nov. pen. 1628. kirk of Selkirk.

SINCE, after the reformation, in provostries, prebends, chaplainries and altarages, the patrons were to bestow their revenues upon bursars in any of the universities, for encouragement of learning; and were from time to time to present such persons as they pleased to those benefices, to the intent aforesaid, who needed no collation or other admission; as I took notice above; it was doubted how the vassals holding of these benefices should be entered. Wherefore, to clear that matter, the case being, that the vassals holding of the titulars of those benefices (who came to be the bursars or poor scholars) could not know from any record who they were, and that they were subject to frequent changes, the entry of heirs, or receiving singular successors in feus holding of those benefices, is to be performed by the patrons standing in the right of patronage, holding of the crown, without consent of the titulars, or interposition of the bishop or presbytery; and where they were founded in royal borows, the town-councils are declared undoubted superiors of them by statute^c, they having been formerly patrons of the same, as the act bears: but tho' these benefices are to be conferred on bursars, in respect to the lands, as above, yet the tithes of the same belong to the patrons, in virtue of the foresaid statutes 1690 and 1693, which are general^d; the case referred to was of a provostry.

^c P. 1567.
^c 10.
P. 1661.
^c 54.

^d Falc. decif. 8. 1744.
Cochran.

81. The expence of upholding the church, to which the patron was subject in times of popery, takes no place at present.

82. In provostries, prebends, chaplainries, and altarages conferred by the patrons on bursars, the vassals enter with the patrons.

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83. Who may be presented, and of what age.

BENEFICES of cure, particularly parish-churches, can only be conferred to presbyters or ministers^a; and therefore, if the presentee is only a licensed preacher or probationer, he must anew undergo his trials, and if he acquits himself worthily, he is ordained a presbyter, and admitted; but, if he is rejected on his trials, the patron may present another within the six months, as is above observed. As by the canon law, if a bishop ordained a presbyter without a benefice, and who had not means to support himself, the bishop was bound to maintain him till he was provided, that the church might not fall under contempt by the poverty of the ministers^b; so, for the same reason, none are ordained ministers with us, till they are to be settled in benefices. By the civil law, one behoved to be 35 years of age before he was ordained a presbyter^c; and by the canon law 25^d; but we have no limited time, because some arrive much sooner than others to maturity of judgment, and other accomplishments.

^a P. 1581. c. 102.

^b Cap. 2. 4. ext. de prebendis.

^c Nov. 123.

^d C. 13.

^e C. 7. ext. de elect.

84. Where there is a controversy about the patronage, how is the church-judicatory to proceed.

WHERE there is a controversy about the right of patronage, he who was last in possession by presenting is preferred: if neither has been in possession, the church may be planted after the lapse of six months, without respect to them^e; because the church must not suffer by a long vacancy. This is more necessary with us, since our church-judicatories have no power to decide the point of right. In case of such competition, the matter was determined, of old, upon a brieve, by an inquest or jury, that cognosed which of the parties, his authors or predecessors, last presented; and he in whose favour they gave their verdict was preferred to the possession, and his presentee admitted and settled in the benefice: without prejudice to the other party to try the point of right as to the patronage itself thereafter^f. Wherefore the last presentation, that took effect by a settlement, is the rule which church-judicatories are to observe in their procedure; unless such party's right was set aside by the proper court since the last presentation, and another preferred, which must regulate their conduct.

^e C. 19. ext. de jure patron.

^f Reg. maj. lib. 3. c. 33.

BUT if the competition is between the king and a subject, and the subject, or his authors in the right, were never in possession by presenting, the crown's presentation must be preferred by the church-judicatories in planting the church; for where the case is doubtful, the presumption lies for the crown, without any possession: so that, in cases of this kind, the subject must declare his right before the court of session, and till then the ecclesiastical courts are not bound to regard it: the king's right is founded in the common law without possession, and therefore is preferable in questions about the settlement of churches; unless another has been in possession by presenting, or has an uncontroverted right to the patronage; or the church has been in use of its liberty, by being planted without any presentation, in which case the settlement ought to proceed in the same course.

85. May the patron present himself, or his son.

A PATRON cannot present himself^g, because that were incompatible, but he may his own son^h; for the paternal power is not respected in spiritual matters, or those which are connected therewithⁱ; nor is there any inconsistency or incompatibility, in this case, of one's presenting his son, which is in the other of presenting himself.

^g C. 26. ext. h. t.

^h C. 25. ext. de preb.

ⁱ C. fin. de judic. in 6to.

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THE right of patronage was originally acquired by founding, building, and endowing a church, as was above observed; and if all this is done by one person, then for certain he has a good claim to the whole patronage of the church; but where more persons concur, the case is not so clear, how their respective interests shall be proportioned and ascertained: the rule in the canon law is, that if he who purchased the ground for founding the church did not proceed to build and endow it, or procure another to do it, he forfeited his claim of patronage, as likewise he who builded it, unless he got it endowed; but, where all concur, they become joint patrons by equal proportions^a: but, with us, their respective claims must be adjusted before the court of commission, when they give their sanction to the new erection, and declare the patronage of the same, as shall by and by appear.

^a Clem. II.
de jur. pat.

86. Where more concur in founding, erecting, or endowing a church, who is patron.

THERE is this diversity between the establishing a fund for a second minister, and the erection of a new church, that tho' the mortifier of the fund for a second minister has a claim to insist for the patronage, yet, if he has not reserved to himself the patronage in the mortification, or been in possession by presenting, it will belong to the patron who had right to present the first minister^b; because the church being already subject to patronage, it cannot be presumed to be free as to the second minister, more than as to the first: whereas, in the erection of a new church, not endowed out of the tithes of the parish, if there is no provision of the patronage to the contributors, it is presumed they intended it should not be subject to any patronage, and therefore it is originally free, and must remain so; for erection of the new church must be authorised and confirmed by a decree of the court of commission, to whose jurisdiction that belongs: and, if in the decree the patronage is not declared to belong to the contributors, I conceive the church will be free of all patronage: but if it is endowed out of the tithes of the parish, there would seem no doubt, but the patronage of the new church should, of course, belong to the patron of the parish-church, to whom the superplus tithes, allotted for the endowment of the new church, pertained; and the commission would so declare in confirming the erection, as was above hinted. I shall touch upon other methods which may found a claim to the patronage of churches, than that of founding, building, or endowing them.

^b Nov. 18.
1681. town
of Hadding-
ton. Newt.
decis. 42.

87. Who presents a second minister, established on a fund raised by private contribution: who patron of a new erected church.

THE patronage of many churches was acquired, after the reformation, by the prelates and commendators of great benefices their resigning parishes, thereto annexed, in the crown's hands, for new erections of them as separate parishes, in favour of particular persons as patrons, as I formerly mentioned. The lords of erection, who got both temporality and spirituality of great benefices erected into hereditary rights, thereby acquired the patronages of all churches that belonged thereto, viz. the ecclesiastical patronages, in manner above explained; but, in their persons, they assumed afterwards the quality of lay-patronages, and were reputed such accordingly: and therefore, in none of our statutes, thereafter, is there any mention of ecclesiastical patronages, as of a distinct nature from the laic ones.

88. How patronage of many churches was acquired, upon the reformation.

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89. The patronage and titularity of the tithes may belong to different persons.

FURTHER, the lords of erection becoming titulars of the menſal churches, belonging to the popiſh clergy, had thereby virtually the patronage of them^a; becauſe, ſince the very property of the tithes of the benefices pertained to them, they muſt have a right to preſent pariſh-miniſters to the ſtipends localled out of them, and to employ the ſame in pious uſes, during the vacancy, and ſuch were likewiſe conſidered as lay-patronages. But this holds only preſumptively; for the right of patronage may be ſeparated from that of the titularity of the tithes: thus, if the patronage has been conferred by the crown to one, and the titularity to another, the right of preſentation, and employing the vacant ſtipends, will belong to the patron; but the right of localling the ſtipend, and of the ſuperplus tithes, will belong to the titular, of which there are divers inſtances.

^a March 25.
1631. biſhop
of Dunkeld.

90. Patronages that belonged to the popiſh or epiſcopal clergy fell to the crown, but not annexed thereto.

PATRONAGE of many churches accrued to the crown by the reformation; for tho' the patronages belonging to the popiſh clergy were not annexed to the crown, not being ſpecially expreſt in the ſtatute^b, yet they returned thereto in the right of the prerogative. Thus likewiſe, the patronage of all churches that belonged to the biſhops do now pertain to the crown, in their right, but are not thereto annexed, more than their tithes or other revenues. The royal prerogative carries the right, where another's does not appear; for then it is of the nature of *bona vacantia*.

^b P. 1587.
c. 28.

91. Patronage acquired or loſt by preſcription.

THE poſitive preſcription is likewiſe a manner of acquiring the patronage of churches, becauſe it is an heritable right, and the ſtatute 1617 extends to all ſuch; but there muſt be a proper title, as an inſeſtment in the tenement, to which the patronage is annexed, in caſe it is a patronage of that kind; but otherwiſe a complete title to the patronage, and poſſeſſion thereon, by preſenting, muſt be ſufficient: in this caſe, not only will the right be preſcribed from one in favour of another, but likewiſe a church, otherwiſe free, will be brought under patronage; but ſome farther require three ſucceſſive preſentations, as well as the courſe of 40 years from the firſt of them.

THUS likewiſe will the preſcription of liberty take place, if the church has been in uſe to be planted, without the interpoſition of the patron, for the courſe of 40 years; unleſs it appear that it was by tolerance from the patron, who may wave his privilege, without prejudicing his right; but this can only hold, according to the former opinion of ſome authors, if the church be ſo planted at three ſeveral times, which, upon the ſame principle, muſt be required to cut off the patron's right, by preſcription of liberty; provided always, that 40 years uninterrupted poſſeſſion has intervened from the firſt ſettlement, either with reſpect to the preſcription of liberty, or the acquiſition of patronage by preſcription; for no right can be acquired by preſcription without an uninterrupted courſe of 40 years poſſeſſion.

92. Whether is it neceſſary that three consecutive preſentations ſhould proceed, in or-

ALL lawiers agree, that the right of patronage may be acquired by the poſitive preſcription, but they have not defined what ſhall be the commencement of it, or how it is compleated. I have exhibited two views of this matter; in the firſt, I have laid down, as a rule, that the preſcription muſt commence by a ſettlement on a preſentation: but,

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but, as one minister may remain incumbent for 40 years, it may seem hard, that one single act, and the course of 40 years thereafter, should exclude the true patron from his right; and therefore, I have stated the opinion of some, who suppose, that three consecutive presentations and settlements thereon would be necessary, besides 40 years uninterrupted possession, for that effect^a.

^a Mackenzie's
observ. on
act 7. P. 1567.

BUT, as a presentation, and settlement thereon, puts the party who presents in the full possession of the patronage, it may be thought, that the incumbent, who comes in by his presentation, continues such possession to him, whereby the positive prescription may run, even upon a single presentation. If there happens a vacancy, during the course of prescription, and the party who was in possession of presenting does not anew present, it would be an interruption of the prescription.

THE same rule, in this view, must take place as to the prescription of liberty; *viz.* that one settlement by the elders and heritors of the parish, of the church as free, and 40 years uninterrupted possession thereafter, should prescribe an immunity from the patronage: for, since patronage is esteemed a servitude upon the church, an immunity from it must be acquired by the same rule, that the church may be subjected thereto.

THIS seems to be the natural import of the positive prescription, which requires no more than the commencement of possession upon a complete title, and the continuance of such possession for the due course of time: and it must be owned, that, while the presentee is in possession of the benefice, the party who presented him must be holden as in the possession of his right; and if it were otherwise, *viz.* that three consecutive settlements were necessary, it might happen, that, instead of 40 years, double that space should be requisite; for the two first incumbents might enjoy the benefice, each 40 years, or more, before there should be place for a third settlement.

A PRESENTATION is the most solemn act of possession of the patronage; but, if the patron is deprived of it, as was the case with us by the act 1690, and till the act of queen Anne restoring patrons to their right of presenting, any other act of possession, upon a proper title by one as patron, must have been sufficient to commence the prescription, as the receiving and employing the vacant stipends; and, if his right and possession continues, undisturbed by the true patron, for the course of 40 years, the prescription must take place: for, if it were otherwise, the right of patronage could never have been acquired by the positive prescription, in case our law had continued, as it was by the above mentioned act 1690, which seems absurd.

I AM the more confirmed in this opinion, that the canon law allowed the right of patronage, even over a free church, *i.e.* one that was at the bishop's collation, without presentation from a patron, to be acquired by the positive prescription, and did not require three consecutive presentations^b. And much more will such prescription carry the right of patronage from one person to another, and which is the opinion

^b Cap. 11.
ext. de jur.
patron.

der to the
positive pre-
scription of
patronage.

93. Most pro-
bable, that
one presen-
tation, and
40 years pos-
session there-
after, is suf-
ficient to pre-
scribe a right
of patronage.

94. And that
one settle-
ment on the
foot of a call,
and 40 years
possession
thereafter of
liberty, is
good to pre-
scribe a right
to it.

95. This fol-
lows from the
nature of pre-
scription.

96. How does
the positive
prescription
proceed,
where the
right of pre-
sentation is
taken from
the patron by
a public law.

97. Prescrip-
tion of the
right of pa-
tronage by
the canon
law.

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opinion of the most eminent of the doctors of the canon law ^a. And indeed it is laid down, as a rule, by them, that one presentation, whereupon follows the bishop's institution, and induction of the clerk presented, is sufficient to give the presenter the quiet possession of the right of patronage, and consequently that prescription may follow upon it ^b.

^a Covar. tom. 1. § 10. p. 439, &c.

^b Id. p. 406.

98. The rebuilding a church alters the case, as to the patronage, by the civil and canon law, but not by our law.

THE rebuilding of a church, quite ruinous, by authority of the bishop, was a mean of acquiring the right of patronage to the re-builder, where the former patron refused to rebuild; for thereby he lost his right by the civil and canon law ^c: but since, by our law, there lyes no obligation upon the patron, as such, to repair or rebuild the fabric of the church, but only, if an heritor, to contribute his share of the expence, he cannot lose his right of patronage by any such neglect or refusal, and consequently the re-builder cannot acquire the right of patronage from him.

^c Nov. 67. c. 2. Garc. de Ben. par. 5. c. 9. § 57.

99. The pope presumed patron of all churches, where the patronage was not instructed to belong to another; does this hold with us, as to the king, in the pope's right; are there not some parish-churches free.

IN the last place, another manner of acquiring patronage was by grant from the pope, who was universal patron of all churches, where the right of another did not appear ^d; and, by that rule, the king, who is come in place of the pope, as to temporal rights of the church, is patron, where the patronage does not belong to any other. The case alters as to churches that clearly appear to be subject to no patron, but free, which sometimes is the case, as is above observed.

^d Can. 16. caus. 25. quest. 1.

IT is the opinion of some of our great lawiers, that all laic patronages did originally belong to the king, by his prerogative, and flowed from him to the subjects ^e; but it is certain, that many lay-patronages of parish-churches, and other benefices, did belong to subjects at the time of the reformation, which are reserved to them by the act of annexation of church-lands ^f. Nor can it be doubted, but the lords and barons of Scotland did found, build, and endow several churches, and thereby acquire the right of patronage; and it is certain, that, even in antient times, they were patrons of divers churches, as is expressly mentioned in an old statute ^g. At the same time, it must be owned, that our kings did found and erect most of the bishoprics, abbeys and priories in Scotland; and particularly king David I. who, for his great munificence to the church, was canonized by the pope; but, on that occasion, was much exclaimed against by some of his successors, a good part of the crown revenues being thereby exhausted.

^e Hope's pract. observ. tit. 2. § 8.

^f P. 1587. c. 29.

^g P. 1471. c. 43.

THE patronage of a vast number of parish-churches accrued to the crown, by abolition of popery, and thereafter of episcopacy, and which at present, as to many of them, belong to subjects, by grants from the crown; and, without doubt, in all cases where it appears that the patronage of any church belonged to those dignities, now suppressed, the same must be understood to remain with the crown; unless a clear right from the crown is produced by the party claiming the same. And in that sense only I can understand the rule, "That the king, in the room of the popish dignities, is the presumed patron," viz. of such churches as were subject to them, and, in other cases,

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cases, where 'tis plain the churches were subject to patronage; and the question is only to whom it belongs.

^a Arg. c. 19.
ext. de jur.
pat.

^b C. 3. cod.
tit. in 6to.

If the patronage belongs to a wife, the husband may present, because he has the sole power of administration^a. If to a pupil, the tutor, for the same reason; but a minor, having curators, may, by the canon law, present without their consent; because, in matters of spiritual consideration, the authority of a curator is not regarded^b. It would seem that, by our law, the minor may either present with consent of his curators, or without them, since it only regards his spiritual concerns, and not his temporal interest; and, by a stronger reason, if he has none, I apprehend nothing can hinder him to present, without being authorised by curators, it not being a judicial act; nor can lesion well occur in the case of presenting, tho' it may, in some sense, by the omission.

100. In the case of a patronage belonging to a wife, a pupil, a minor, a person whose estate is sequestered, or to an university, who are intitled to make the presentation.

If the ténement to which the patronage is annexed stands sequestered before the lords of session, when the vacancy happens, the sequester or factor may present, because the whole administration is committed to him; and he is in the place of the patron, and the right should vanish by the lapse of six months. An university or corporation may present, by their administrators, or a commissioner. The corporation itself, considered as a collective body, is patron, and not the particular members, for that is the case of all rights belonging to corporations.

THE chapel royal was a collegiate church, founded by our kings for their own use. The superior of it was called Dean of the Chapel Royal, and the other members Prebendaries, who did therein officiate. This benefice was, after the reformation, conferred first to the bishop of Galloway, but thereafter annexed to the see of Dunblain, and the bishop was dean of it. The revenues of it now, since the abolition of episcopacy, are in the crown, and the king bestows them upon one or more ministers, whom he creates his chaplains, removable at his majesty's pleasure; and the patronage of such churches as belonged to the deanry, at the abolition of episcopacy, is now in the crown; unless it is expressly conveyed to his majesty's chaplains, in their gift of the profits and emoluments of the deanry; for it will not follow in course.

101. The state of the chapel royal, its revenues, of old and at present.

^c Clem. II. de
estate et qual.
ordin.
^d P. 1567.
c. 7. P. 1592.
c. 116.

^e Can. 113.
caus. 1.
quest. 1.

By the canon law, all collation or provision of benefices was to proceed upon election, by the chapters or convents, or presentation from the patrons, without interposition of the people, or asking their consent^c. This likewise is conform to our present law, with respect to our settlements of parish-churches, as was above mentioned^d. But well-disposed patrons do not insist to have a minister thrust in upon a people, which is frequently of bad consequence to the success of his ministry among them. By the old canons, the consent of the better part of the people, termed *Sanior pars*, was adhibited to all settlements, whether of bishops or presbyters; and those who are admitted otherwise, are said to enter not by the door, *i.e.* CHRIST, but as thieves or robbers^e. The reason assigned is, that the city or parish

102. How far, by the canon law, our old law, after the reformation, or our law at present, the interposition or concurrence of the people necessary in the settlement of ministers.

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will probably contemn or hate a bishop or pastor settled among them against their inclinations ^a.

^a Can. 36.
distinct. 63.

BUT this does not import a popular election, which might give occasion to tumults and undue practices, and which could hardly proceed upon judgment, and were destructive to the rights of the church, and of the privilege of the patrons ^b. It was only the consent and approbation of the most honourable persons that was required to settlements, which was likewise consonant to the civil law ^c: therefore the method prescribed to presbyteries, by the late act of assembly 1732, in settling ministers, when the right devolved to them, was, in some measure, agreeable to the antient practice; but it is now repealed, as having past into an act, without the preliminary forms of making standing rules or canons ^d.

^b Can. 16.
can. 8. quest.
1.
^c L. 19. cod.
de episc. au-
dien.

^d Act of assem.
1734.

103. If there is no appeal against the settlement by the presbytery, to superior church-judicatories, it is final as to the cure of the parish; is it so likewise as to the right to the benefice or stipend.

THERE does not appear any precise time limited, within which the presbytery is to finish the settlement, after the presentation is offered; but, if they delay or refuse, appeal lies to the superior courts, in a due gradation, as is formerly observed; and the sentence of the general assembly is final ^e, in respect to the pastoral relation between minister and people, which belongs to the cognizance of the church: but the patronage is a civil right, not subject to the ecclesiastical jurisdiction. Hence, if the presbytery refuse to admit a qualified person presented to them by the patron, it is lawful to the patron, by an old act, to detain the whole fruits of the benefice in his own hands ^f; but I should think that, by the subsequent statutes, he is bound to employ them, as other vacant stipends, on pious uses ^g, of which privilege I have already spoken. And if the church-judicatories shall settle any other than the person presented, the church is still deemed void, as to the right to the tithes or stipend; which therefore the patron may retain, as in the case of a vacancy, where no legal objection lies against the presentation or presentee; and the court of session have a power to cognosce and determine upon the legality of admission of ministers, with respect to their claim to the benefice or stipend, that being a civil right ^h.

^e P. 1567.
c. 7.

^f P. 1592.
c. 117.
^g P. 1690.
c. 23. 10 An-
næ, c. 11.

^h Feb. 14.
1735. mini-
ster of Auch-
termuchtie
against Mon-
crief of
Reidy.

104. The rule in the Roman chancery, *De verisimili notitia*; the same applied to the case of the patron's probable knowledge of the vacancy, from which time the six months commence.

CHURCHES under lay-patronages often fell in the pope's hands, by a rule in the chancery. Each pope, upon his accession to the papal chair, always confirms and authorises certain rules, called the Rules of Chancery; sometimes with, and at other times without addition to those used by his predecessor; after the example of the Roman pre-tors of old, who, at their entry, issued an edict, conform to which they were to administer justice, during their office. By one of these rules ⁱ, the popes reserve several benefices to their own disposal; as voidances that happen, by the incumbent's dying, in certain months of the year, or dying when at the court of Rome, which are said, *Kacare apud sedem apostolicam*. Now, to prevent sub-reptitious grants, it is provided by another rule of the Roman chancery, termed, *De verisimili notitia* ^k, "That all grants, or provisions of benefices given by the pope, before such time as the death of the incumbent might probably have come to the pope's knowledge, shall be void." The distance of the place where the incumbent died, and the ordinary time of advices coming from such place to Rome, is considered, tho'

ⁱ Reg. 9. et
seqq.

^k Reg. 30.

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tho' the pope, perhaps, is occasionally elsewhere at the time: it takes place, as well in the grants of Commends as of proper titles to benefices^a.

^a Gomes ad
dict. reg.
quest. 4.

THE natural equity of this rule has recommended it to our practice. Thus, grants, by the sovereign, of benefices *in commendam*, vacant by the death of those who possessed them, were found null, if impetrated before the incumbent's death could probably come to the king's knowledge^b. This rule may likewise be of use to explain the time when the patron's probable knowledge of the incumbent's death shall be inferred, in order to the six months commencement, within which he is to present. This is the case by our old statute^c, which must still take place, the patrons being restored to their antient right of presentation, as was above remarked.

^b Spotiswood
(kirkmen)
Mr. William
Melvil.
^c P. 1567.
c. 7.

THOSE are the regular methods of providing benefices by the canon law; but, to prevent multiplicity of disputes, concerning titles to benefices, the rule in the Roman chancery, *Pacificus triennalis possessor beneficii est inde securus*, termed *De triennali possessore*, was introduced: it imports, "That if a churchman, upon a colourable title, " possesses a benefice peaceably for three years, he cannot thereafter " be molested, or his right questioned, provided his entry was not " simoniacal." It does not require *bona fides* in the possessor, which was necessary in other prescriptions by the canon law. This rule is of excellent use in popish countries, to quiet the minds of beneficed persons, who otherwise would be exposed to perpetual pleas concerning the legality of their titles. It requires a colourable title, *titulus coloratus*, viz. that the grant or collation of the benefice be made by one that, by the common rules, has right to confer it, as by the bishop of the diocese; and if the bishop, by excommunication or otherwise, was incapable at the time; or if that particular benefice was one of those reserved to the pope's provision; or if it was granted by the pope, contrary to the preceeding rule *de verisimili notitia*; this rule will secure the possessor from all challenges upon these heads, or on account of any other informality, but will not supply the disability of the possessor^d; and there have been instances with us where the rule was applied in competitions about benefices^e. But with us, at present, and ever since the establishment of presbyterian church-government, there is no great use for this rule; because all provisions, or settlements of churches, are, by judicial acts of the presbytery, or other church-judicatory; and if no appeal is entered against their judgment within ten days, it becomes irreversible; but, if the church is under patronage, the settlement ought not to be entred upon till six months elapse, after the vacancy might have come to the patron's knowledge, unless the patron concur, by expressly giving his consent; for tho' the edict is duly served, after such time as the vacancy might have come to the patron's knowledge, his presumed acquiescence will not infer his homologation of the settlement, as is formerly mentioned.

105. The other rule of chancery, triennalis possessor beneficii est inde securus; how far takes it place in our law.

^d Rebuff. de
pac. poss.
§ 142. et
seqq.
^e July 4.
1627. Mac-
kenzie.

BUT there may seem to be place for the rule, if the patron's presentation is finally rejected by the supreme church-judicatory, and no challenge made by the patron, as to the right of the person settled to the benefice, before the court of session, for the space of three years after

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ter his settlement, in contradiction to the patron's presentation of another; for I conceive that this rule in the canon law ought to be followed, since we have neither law nor practice to the contrary.

106. The maxim, *decennalis et triennalis possessor beneficii non tenetur docere de titulo*, not a rule in chancery, but an extension of the other, *de triennali possessore*; how this understood in the canon law, and in our practice.

THE above-mentioned rule requires a colourable title; but if the churchman has possessed the benefice ten years peaceably, he thereby acquires a presumptive title; and if, after the ten years, he possesses three years more, without any challenge, this rule will secure him, tho' he have no title in reality, the ten years possession standing in place of a colourable title, for acquiring right to the benefice by the subsequent triennial possession. Hence it is laid down as a rule, that *Decennalis et Triennalis possessor beneficii non tenetur docere de titulo*. In this maxim the ten years is justly divided from the three years possession, because the decennial possession, as a colourable title, is the foundation of the privilege thereafter acquired by the triennial possession. This is only an extension of the rule *De triennali possessore*, and no particular rule of chancery, as some of our lawiers have imagined: for, where there is a probable title, the three years possession is sufficient; but, where there is none, ten years possession, preceeding the three, supplies the title; and therefore the maxim bears, that *Non tenetur docere de titulo*, such possessor is not bound to shew any title to the benefice after 13 years peaceable possession of the same. This maxim takes not only place with us, but likewise in other nations^a, and is founded on the practice of the court of Rome, in applying the rule *De triennali possessore*^b.

WE make use of this maxim, built on the rule *De triennali possessore*, more than we do of the rule itself, but to a different purpose. It was originally intended, only to secure the possessor in a right to the benefice; but, by our practice, churchmen, by 13 years peaceable possession of particulars, as belonging to their benefices, acquire a right of them to the benefices; so that neither they, nor their successors, are bound to shew any other title, but only to prove the 13 years possession. Thus, the 13 years possession acquires to the benefice the subjects possessed as parts of the same, without distinguishing the first 10 years possession from the subsequent three, the provision to the benefice being a title to all the subjects possessed as parts thereof.

BUT still this 13 years possession, by our practice, only founds a presumptive right, so as to liberate the churchmen thereafter from any obligation to produce the titles to the same; but if their titles appear, the right will be thereby regulated: thus, if it was a redeemable right, the reverser will not be cut off, by the 13 years possession, from the privilege of redeeming^c; or if the title of possession was a decree of locality, the minister's possessing more out of any particular lands, than he has right to by that decree, will not secure him or his successors in the overplus; for the payment will be presumed erroneous, and limited in time coming by the decree: but if the decree of locality has never been in observance, as not being mentioned in the minister's discharges, nor the payments out of the particular tenements, conform to the Quotas therein allocated, the 13 years possession will take place, notwithstanding such obsolete decree^d.

^a Faber. cod. sabund. lib. 1. tit. 2. de fin. 76.
^b Gom. ad dict. reg. quest. 26.

^c July 11. 1676. bishop of Dunblane.

^d Nov. 28. 1676. Semple.

AND

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^a Feb. 2.
1681. Lefly.

^b July 1746.
Mr. John
Lookup.

^c Decem. 6.
1672.
Veitch. Feb.
9. 1675.
Dunlop.

^d Rebuff. de
pacif. poss.
§ 167.

^e June 24.
1630. Scrim-
zeour. March
21. 1628.
Murray.
^f P. 1672.
^g 13.

AND even where a decree of locality is the rule of payment, that can only be understood in respect to the minister's stipend affecting the tithes, as to which his right is limited ^a; therefore he can no more, by use of payment out of the tithes, extend his right beyond the terms of the decree of locality, than an heritor having a bounding charter can acquire, by prescription, lands without the bounding; for none can prescribe contrary to his title of possession, since his possession is so far without any title: but as to other subjects besides the tithes, nothing hinders a stipendiary minister to acquire them by 13 years possession, over and above the stipend; because such minister may receive grants or mortifications for the use of himself and successors in office, notwithstanding the decree of locality: now the 13 years possession presumes such grant, the title whereof, after the prescription is completed, the churchman is not bound to produce. But the lords of session did not sustain the 13 years peaceable possession of a cow's grafs, on a particular heritor's ground, sufficient to establish a right ^b: this, I conceive, has been so found, because the maxim concerns subjects that were capable of being possessed as parts of a benefice of old, which a cow's grafs could not, being only introduced by the statute 1663.

As 13 years possession acquires right to churchmen of particular subjects, so seven years possession gives them the benefit of a possessory judgment, without any title other than their provision to the benefice, in relation to such subjects, whereof they are possessed as part or pertinent ^c. The triennial possession is not here sufficient, because that only secures the churchman from any challenge with respect to his provision to the benefice; but does not concern the particular subjects possessed, as belonging thereto, and so cannot cut off the rights of third parties; but as seven years possession, by our law, upon a legal title, affords the benefit of a possessory judgment in the common case, so, in churchmen, it must be sufficient, upon their provision to the benefice, without any special title; because they acquire a perfect right by 13 years possession, unless their title appear, and limit their right and possession.

Tho' interruption, by citation, is used by one before the privilege is acquired, yet the possession is still held as peaceable with respect to all others who did not interrupt, nor derive right from him who did ^d; because, as to those, the possession is undisturbed.

SECTION V. *The Power of beneficed Persons over their Benefices.*

THE churchman, being duly admitted to the benefice, has right to all the rents, fruits, and profits that fall due after his entry; but in this case there is a considerable difference between beneficed persons and other liferenters. The case of ordinary liferenters is governed by the stated terms of Whitsunday and Martinmas, both as to their entry and demise; but as to tithes, either in kind, or where a tack-duty or use of payment comes in place of them, according to the canon law, they were due when the fruits were cut down, and which was likewise the case with us of old ^e; but now, by the later statute ^f, concerning the annat, two terms are to be respected in all

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questions

107. Can a minister, on this maxim, acquire beyond the bounds of his decree of locality.

108. A churchman, by seven years possession, acquires the benefit of a possessory judgment; how does this differ from the acquisition by the triennial, or 13 years possession.

109. The interruption of a churchman's possession.

110. The terms for ministers stipends and tithes, Whitsunday and Michaelmas; these regarded both as to their entry and demise.

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questions concerning beneficed persons their right to the rents or profits of the benefice, or to the stipend, namely Whitsunday and Michaelmas: therefore, if one is settled before Whitsunday, he has right to the whole year's rent, but if after Whitsunday, and before Michaelmas, he is intitled only to the half. The reason assigned for introducing those terms is, that at Whitsunday the whole corns are presumed to be sown, and at Michaelmas to be reaped. The like rule holds in the case of the incumbent's death, or other removal from the benefice, that he, or those in his right, can only claim the terms that were past, while he was incumbent, or before his removal; only, in case of death, the annat is farther due to his wife, and nearest of kin, as shall afterwards appear. I shall next speak of the further powers competent to a beneficed person over the benefice, during his incumbency, of which I discoursed a little in another place^a, but I shall now more fully discuss the same.

^a Sup. tit. 3.
sect. 6.

111. Beneficiaries had power to alien part of their benefices, tho' only liferenters; the requisites to such alienations, and for what causes they might, by the canon law, be made.

It might indeed seem, that benefices, being set apart for the service of the church, and in effect to divine use, no part of them, or emoluments thereto belonging, could be aliened, more especially that the incumbents for the time are only liferenters: but the power of lawful administration being competent to them, they might alien, for reasonable causes, parcels of their benefices, all due solemnities being observed. Bishops, Abbots, Priors, Provosts, or Superiors of collegiate churches, in order to validate the alienations, made by them, of lands and heritable rights, behoved to obtain thereto the consent of their chapters or convents; of whom two thirds ought to have been present and chapterly convened, and the major part of those present to assent to the alienation: the consent of the chapter or convent was likewise requisite to alienations made by any of their members; as also the consent of the superior, whether bishop or other dignified person: and to the alienations by the inferior clergy, not members of the chapters, the consent of the patron and bishop of the diocese was alone necessary^b.

^b Cauf. 12.
quest. 2.

THOSE solemnities were required, that such alienations might not be made without just cause. The causes for which the lands, or other temporal rights, might be aliened, were, 1st, Necessity, for payment of the debts due by the church to whom those lands belonged. 2. Charity, for redemption of captive Christians from infidels, or for relief of the poor. 3. Expediency and utility of the church, as the better improvement of the lands, and securing the rents, by granting feus of the same. Those were the requisites alone by the old canons^c; but, by the later constitution, no lands or hereditaments, belonging to any bishopric, abbey, or other benefice, could be alienated, or set in tack for three or more years, without the pope's consent or confirmation^d; so that the former solemnities still remained, and this was superadded, to the infinite advantage of the papal see.

^c Ibid.

^d Cap. un.
extravag.
com. de reb.
eccl. non.
alien.

112. The usage in times of popery and episcopacy with us.

WE followed the canon law, for the most part, in this matter; for it is plain, from our statutes, that church-lands could not be aliened without the consent of the chapter or convent, and upon just causes, and all solemnities requisite being observed. It likewise appears, that the pope's, or king's consent, or confirmation to deeds granted before the

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a P. 1564.
c. 88.
P. 1584. c. 7.
P. 1593.
c. 190.
b P. 1425.
c. 48.
c Garc. de be-
nef. par. 11.
c. 5. § 150.

the reformation, was required; and therefore such deeds, which had not the one or the other, are declared void, in respect that such was the law at the time of granting the deed; but there was a time limited, within which they might still be confirmed by the king^a. The king's confirmation is declared equal to the pope's, because, with us, the pope's constitution could not take place, but so far as it was received by our legislature^b. This is even the case in popish countries, with respect to the canon law, in relation to temporal rights^c, that the pope's constitutions are only binding without his territories, or temporal jurisdiction, so far as they are received in those states.

d Reb. de re
eccl. non a-
lien. c. 28.
§ 25.

BUT there is an exception from these rules, that lands in use to be feued, *Infeodari solita*, may anew be set in feu, if they open or return to the church, by the bishop alone, or other beneficed person, of whom they hold, upon the same terms as in the former rights^d; because they were not the patrimony of the church, as to the property. And, by a stronger reason, they might be renewed to heirs and singular successors, without any of those solemnities, for that was only a continuing the right as it stood. And this was likewise the rule with us, as to the receiving of heirs and singular successors, and no doubt did hold likewise as to renovation of feus that returned to the church^e, that being no prejudice to the constant patrimony of the church.

113. The case of lands, in use to be feued, as to the prelates power.

e P. 1617.
c. 2.

f P. 1606.
c. 3.

WITH us, tho' the consent of the major part of the chapter was necessary to deeds granted by the bishop, or any of themselves, yet they needed not be chapterly convened; and if any number of them were subscribing, it was presumed to be the major part, nor were minors or absents out of the kingdom computed^f. Where the consent of the chapter was necessary, it must have been obtained before the death of the granter, otherwise the deed fell as incomplete.

114. How the consent of the chapter or convent was to be adhibited.

g P. 1457.
c. 71.
P. 1503.
c. 91.
P. 1584.
c. 190.
h Sup. tit. 3.

FOR the policy of the kingdom, by improvement of lands, it was allowed, by special statutes, to prelates, as well as others, to set their lands in feu-farm; provided it was to a competent avail, *i. e.* without diminution of the rental, as it stood at the time of granting the feus^g. And to prevent any suspicion of the rental's being diminished, there was always, in such feu-right, a small addition made in augmentation of the rental, as I have observed elsewhere^h. Therefore, it may seem, that, while these laws were in force, the feus then granted needed no confirmation, either by the king or pope; and yet the subsequent statutes, above referred to, declare all feus by churchmen void, without distinction, that wanted such confirmation by the pope or the king. Hence we may observe, that notwithstanding the acts allowing churchmen, as well as others, to set their lands in feu, it was customary to adhibit the pope's or king's consent or confirmation. The prelates depended intirely upon the pope, and behoved not to contravene the above papal constitution, which prohibits the aliening, or setting in feu, church-lands without the pope's consent. The law of temporal princes could not warrant them in withdrawing obedience from the see of Rome, tho' it has been already observed, that the pope's constitutions had no farther authority with us, than

115. What required of old in churchmens feuing their ward-lands.

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as they were received. Those acts did not supersede the consent of the chapter to these deeds, which was necessary to validate them; for, as the statutes themselves import, it was only the danger from the superior, of whom the lands were holden, with respect to recognition or other casualties, that those statutes prevented; but did not in the least dispense with the solemnities necessary for completing the deed.

BUT, after the reformation, when episcopacy was re-established, the bishops might set their lands in feu, with consent of the major part of the chapter, without necessity of the king's confirmation^a. This could not take place after the old statute was repealed, as to ward-lands holden of the crown, without hazard of recognition^b, as the law then stood.

^a P. 1606.
C. 3.

^b P. 1633.
C. 16.

116. Dilapidation of the benefice; the power of prelates, or the inferior clergy to set tacks: are the laws against dilapidation of any use with us at present.

WHEN beneficed persons diminished the rental below what it was at their entry, or made waste upon the houses or other subjects of the benefice, it was termed a Dilapidation of the benefice, whereby its revenues were dissipated, and the houses, &c. deteriorated. And because that was frequent, after the reformation, by prelates, commendators, or titulars of benefices, therefore they were bound, before expediting of their signatures, to find caution to leave the benefices in the same condition they found them at their entry; and the feus, tacks, or pensions, granted by them, or changing of victual-rent into money, whereby the rental was diminished, were declared void; and ministers, provided to inferior benefices, farther incurred, by such deeds, deprivation from their office and benefice^c.

^c P. 1581.
C. 101.
P. 1585.
C. 11.

AND because the setting of long tacks, even without diminution of the rental, is prejudicial to the successors in the benefices, therefore no bishop, or other prelate, could set in tack any part of their patrimony for longer space than 19 years^d. But that does not seem to concern tacks set with consent of the chapter; because, by the former statute^e, they might, in that manner, even grant feus, as is above mentioned, unless we shall suppose, that that statute is so far repealed by this. Inferior beneficed persons, by the same statute, were discharged to set tacks for longer space than their own lifetimes, and five years thereafter, even with consent of the patron; and without his consent, they could not set tacks for longer than three years^f. But those statutes are declared not to extend to tacks, or prorogations of them granted by the commission for plantation of churches, or made in obedience to their sentences, which are frequently for many 19 years, as shall afterwards appear.

^d P. 1617.
C. 4.

^e P. 1606.
C. 3.

^f P. 1593.
C. 203.
P. 1621.
C. 15.

THOSE laws, against dilapidation of benefices, seem to be of no great use at present; because the great benefices of popish foundations are erected into temporal lordships, and become hereditary rights of property; or were annexed to bishoprics, which, with the other revenues of those bishoprics, are now in the king's hands, and employed or disposed of as his majesty sees cause. Many of the bishops rents are appropriated to bursaries and universities, and some of them heritably granted to private persons. And as to stipendiary ministers, they cannot be prejudiced by any deeds of their predecessors: it is true,

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true, the law still takes place as to tacks set by ministers of parsonages, in full possession of the benefices, that the same are good, without consent of the patron, for three years, and with his consent for their lifetimes, and five years thereafter. The building and keeping manfes in repair shall be discoursed upon afterwards.

OUR kings, as they were most liberal in bestowing lands on the dignified clergy, they erected them into regalities and baronies, with great privileges and borows thereto belonging. The prelates again feued out great parts of their lands to hold of themselves, (which they might lawfully do in terms above described) and granted heritable bailiaries over their whole regalities. These feus, bailiaries, and burghs of regality and barony, are saved from the general annexation, and hold of the crown, as they did of the ecclesiastical persons formerly. Hence we had bailiaries of regalities, where the regalities themselves were suppressed; but truly the privileges of these bailiaries were not much inferior to those of regalities, of which

^a Sup. tit. 3.

I have treated more fully elsewhere^a. The ecclesiastical burghs of regalities and baronies likewise hold immediately of the crown, independent of any lord of regality or baron; but they are, notwithstanding, by no means equal to borows royal, which are endowed with great privileges peculiar to themselves, of those also I have spoken in the just quoted place. I shall only observe here, that the entry of heirs of vassals in lands within the liberties of those borows of regalities and baronies, holding now of the crown, is to be by briefs out of the chancery, not directed to the provost and bailies of those burghs, but to the sheriff, and the service is to be retoured to the king's chancery, and the infestment to proceed, as in other lands holden of the crown^b: but, in some of these borows, the heirs in burgal tenements, by immemorial custom, are received by hasp and staple, and other titles made up to the same, as in royal borows.

^b P. 1587.
^c 29.

THE heritable bailiaries and stewartries, granted by ecclesiastics before the reformation, are reserved to the persons interested therein, by the general act of annexation 1587, to be holden of the crown; and which is established by the subsequent statute^c, declaring the superiority of all church-lands to belong to the crown: so that the lords of erection were no more than heritable bailies of the regalities that belonged to the ecclesiastics, and that only in case they were created such by them; which behoved to be before the erection of the benefices into temporal lordships, that happened after the suppression of the popish dignities. But now those, as all other heritable bailiaries, as well as regalities, are abolished by the late act, with reservation only to the owners of their right of barony, or other lower jurisdiction independent of such regality or bailiary^d, as I shall observe at large in another place^e.

^c P. 1633.
^c 14.

^d 20 Geo. II.
^e B. 3. tit. last.

THE lords of erection have right to the feu-duties of the lands holden of these benefices, notwithstanding the superiority is declared to belong to the crown^f; which right to the feu-duties is now become perpetual, by the discharge and renunciation of the right of reversion, that was reserved to the crown, granted by special statute^g.

^f P. 1633.
^c 15.

^g P. 1707.
^c 11.

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117. Ecclesiastical regalities, baronies, bailiaries and stewartries; what the reserved right of lords of erection, by the act 1633, and at present.

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118. Why the charters of lords of erection, commonly of blench-holdings.

THE lords of erection are liable to the crown, in the feu-duties that were payable by themselves, for their own proper lands, holden by them of the beneficed persons in feu, before the erection; and farther, they are subject to the blench, or other duty contained in the charter of erection; because that still contains the whole lands, and gives them right to the feu-duties payable by the vassals, and even to the superiority itself, in case the vassals chuse to hold of them rather than of the crown.

CHARTERS of erection contained, for most part, blench-holdings; because many of the lands mortified to the church were holden *in pura et perpetua elemosina*, or in free alms, which is a blench-holding of the freest kind: and because the services and casualties due to the superior were thereby lost, his consent was certainly necessary; and, for this reason, it is affirmed in our old law-books, that land could not be mortified to the church without consent of the king, his majesty being the ultimate and paramount superior of all lands in Scotland^a. This shews, that the mortifying lands to the church, colleges, burghs, or any other universities or corporations, cannot establish a different manner of holding, commonly termed in Mortification, as I have remarked elsewhere^b.

^a Reg. maj. lib. 2. c. 26.

^b Sup. tit. 3.

SECTION VI. *Manfes and Glebes of Parish-ministers.*

119. Beneficed persons, about the time of the reformation, set in feu, or long tack, even their manfes and glebes: regulations, in order to provide ministers with manfes and glebes, after the reformation.

PRELATES, parsons, vicars, and other churchmen, were in use to set in feu, or long tack, their manfes and glebes, tho', by the canon law, the clergy were restrained from aliening their mensal lands. The Manse is the minister's mansion or dwelling-house, and office-houses belonging thereto. The Glebe is a certain portion of land adjoining to the manse, allowed to the minister serving the cure of the church, for the conveniency of his living; and we need not doubt, but that, of old, churches were sufficiently provided with these. But, at the reformation, when the pope's authority was thrown off, the popish clergy, while they remained in possession of the benefices, used, to the utmost extent, the liberty granted them, as well as others, by the old statute^c, to set their lands in feu; so that the ministers of the reformed religion, coming afterwards to be settled in the churches, were in hazard to have no place of residence in most parishes. Wherefore, to remedy this inconveniency, it was provided, that, in time coming, no parson, vicar, or other ecclesiastical person should set in feu, or long tack, any of their manfes or glebes; and the ministers, serving the cure, were to have the manse next to the church, and four acres at least of the glebe thereto adjacent^d. This was after extended to the manfes and glebes of cathedral and abbatial churches, where there was no parson's or vicar's manse and glebe of old^e. This appropriation took place, whether those glebes were set in feu or not; but the feuars had their option, either to quit their possessions, or purchase to the minister a sufficient manse, and glebe of the above extent, equally good.

^c P. 1471. c. 71.

^d P. 1563. c. 72. P. 1572. c. 48. ^e P. 1592. c. 118.

120. The order of designating church-lands for

BUT because some churches had no glebe of old, or not of sufficient extent; therefore it is provided in that case, by a subsequent statute, that designation shall be of a glebe out of parsons, vicars, abbots

TIT. VIII. Manſes and Glebes of Pariſh-miniſters. 47

abbots, or priors lands, and, failing of theſe, out of biſhops or friers lands, or any other church-lands within the pariſh, to the extent of four acres of arable ground, with freedom of foggage, paſturage, fuel, feal and divot ^a. If the order here fixed is neglected, the designation is void; as if biſhops lands are deſigned, when there are parſons lands in the pariſh, even tho' feued before the ſtatute ^b. If there are not four acres of arable ground of ſuch lands, near the church, then, in place thereof, 16 ſoums graſs, of the moſt commodious paſturage of any church-lands, lying moſt adjacent to the church, muſt be deſigned according to the above order ^c. The designation of manſes and glebes was formerly to be by the biſhop, with advice of two or three diſcreet men of the pariſh ^d; and now is by the preſbytery, with ſuch advice. If, after a designation is made, the poſſeſſors do not yield the poſſeſſion of the lands deſigned to the miniſter, he, upon producing the ſame before the lord ordinary on the bills, will obtain warrant for letters of horning, to charge them to remove from the ſame; and, upon his diſobedience to the charge, caption will of courſe be iſſued.

manſes and
glebes.

^a P. 1593.
c. 165.

^b Jan. 25.
1665. parſon
of Dyſart.

^c P. 1606.
c. 7. P. 1621.
c. 10.
^d P. 1663.
c. 21.

By thoſe ſtatutes, there was no provision of manſes where there was none of old, nor of glebes where there was no church-lands within the pariſh; both theſe hardſhips are remedied by the later ſtatute ^e. As to manſes, the act provides, that the heritors of the pariſh ſhall build them on their own expence, not exceeding 1000 l. nor under 500 merks, at fight of the biſhop, (now the preſbytery) with two or three diſcreet men of the pariſh: that it being made once ſufficient, the miniſter, during his incumbency, ſhall keep it in repair, and the heritors, during the vacancy, out of the vacant ſtipends; and half an acre of ground is, by cuſtom, allowed for the manſe and garden.

121. The
rule for
building
manſes where
there are
none.

^e P. 1649.
c. 11. c. 31.
revived.
P. 1663.
c. 21.

In reſpect to glebes, where there are no church-lands out of which they can be deſigned, I conceive that the designation, by the intendment of this act, is to be out of temporal lands; for tho' it is not expreſſly ſo ordained, yet, in the latter clauſe of the act, all churches, not then already provided with glebes, are to have a designation of the ſame, without limiting it to church-lands; and with exception only of incorporate acres in towns and villages, and of the heritors houſes and gardens, they giving other lands near the church in lieu thereof; and it cannot be doubted, but every country church muſt have a glebe, as well as a manſe: and, by an act of one of the reſcinded parliaments, after the example of which, I apprehend, this ſtatute was made, where there are no church-lands, or houſes within the pariſh, formerly belonging to eccleſiaſtics, other lands near the church may be deſigned ^f. But miniſters in royal borows, that have no landward pariſh, have no right to glebes; and I conceive neither have they to manſes, as manſe and glebe come under the ſame regulations, by the ſeveral ſtatutes in that behalf; and the uſage is accordingly, tho' this act incidentally mentions only that they have no right to glebes.

122. Tempo-
ral lands
may be de-
ſigned in de-
fault of
church-
lands.

^f P. 1644.
c. 31.

AND, becauſe miniſters were ſtill ſtraited for want of graſs, therefore it is provided, by this ſtatute, that every miniſter who hath right

123. Graſs
for a horſe
and two

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cows, or 20 l. Scots in lieu of it, to be designed to the minister.

right to a glebe, shall have, over and above the glebe, grafs for a horse and two cows, or 20 l. yearly, if there is not convenient ground for grafs: thus, the extent of the pasturage, granted in general to ministers of our church, by the act 1593, is, by this act, ascertained to a particular Quota or sum; where the 20 l. takes place, it is to be proportioned on all the heritors^a, whereas the grafs in kind is designed in the same manner as the glebe.

^a 3. Jan. 1742. Ferguson.

124. The grafs is to be designed, tho' the old glebe was sufficient for it, besides the four acres.

THIS, being expressly additional, takes place, tho' the old glebe consisted of four acres of arable land, and as much more as might serve for grafs to a horse and two cows; as likewise, tho' in place of arable ground, the minister had 16 founs grafs designed him for his glebe^b; because the statute makes no distinction whether the glebe be large or small, or whether it consists of arable ground, or of 16 founs grafs.

^b P. 1606. c. 7. Jan. 1734. Farquhar Bethune, minister of Croy, contra Dallas.

125. Ministers glebes are free of tithes.

IT seems that, after the reformation, the titulars of tithes presumed to claim them out of the lands designed to ministers for their glebes, and therefore special statutes were thought necessary to declare the same tithe-free^c; tho' it is not conceivable, that the old glebes could ever lawfully have been subject to tithes, after the reformation, more than before.

^c P. 1578. c. 62. P. 1621. c. 10.

126. The relief competent to the heritor, whose lands are subjected to a designation for a manse, glebe, or grafs to a minister.

IF designation of manse and glebe is out of old glebes, the heritor has only relief against those who have feus of other parts of that glebe, or other glebes within the parish; because, by the old acts, they are solely liable, and such grounds were originally destined for that use: but, if the designation is out of other church-lands, the heritor, whose lands, as being nearest the church, are designed, hath relief against all the other feuars, or heritors of church-lands within the parish, proportionably^d, conform to the valuation. If the designation is out of temporal lands, relief is competent against all the other heritors of the parish, but such designation cannot be, while there are any church-lands in the parish^e. This relief will not affect singular successors, whose rights are subsequent to the designation, but only is good against the heritors for the time, and their heirs, it being only competent by way of personal action; nor will it bear interest from the designation, but only from the citation in the process of relief^f; because, till then, the other heritors are *bona fide* possessors of their grounds, on account whereof they are liable in such relief.

^d P. 1594. c. 202.

^e Feb. 6. 1678. lord Forrest.

^f Dir. de. cif. 352.

127. Manses and glebes hold of the crown, and the liferent-escheat of the incumbent falls to the king.

MANSES and glebes, belonging to parish-churches, are the only temporality at present reserved to our clergy, of the great possessions that formerly belonged to them in times of popery; and, even when episcopacy took place, their revenues were not inconsiderable. It might seem that the manse and glebe hold of no superior; but truly they hold of the king, as other lands do, and they are commonly designed out of these old mortifications; and therefore the liferent-escheat of the incumbent, that lies year and day at the horn, falls to the king, as that of all church-lands holden of the crown do^g.

^g P. 1572. c. 49. 28th March 1628. Fletcher.

SECTION

TIT. VIII. Rights of Lands, with Tithes included. 49

SECTION VII. *Rights of Lands, with the Tithes included.*

THE beneficed persons not only aliened their lands, in manner above set forth, but their tithes likewise with them, which are termed the spirituality of the church, and the proper patrimony thereof. Tithes, being of a spiritual consideration, could not be simply aliened by themselves, but could with the lands to which they belonged; therefore, when beneficed persons found it expedient, or necessary, to feu the lands, they frequently granted a right to the tithes in the same charter, and took a joint feu-duty for both.

128. Rights to lands, Cum decimis inclusis, is an infeodation and impropriation of the tithes; how prescription of such rights proceeds.

THOSE rights, for most part, bore, *Cum decimis inclusis, nunquam antea separatis*; because, while the lands were possessed by farmers, the beneficed person had always received a joint rent for stock and tithes, and set the same in feu for the old rental. This infeodation of tithes was allowed before the third general Lateran council, but that council prohibited it in all time thereafter^a. However, it being next to impossible to show a progress from that time^b, such rights as appear to have flowed originally from churchmen are sustained, as being presumed, from long possession, to have been granted before that council. Or, at least, they were secured by prescription; because, tho' laymen were understood incapable to possess tithes without infeodation, before the foresaid Lateran council, or even to receive such feus after that council, yet they were still capable to prescribe a right upon the title of a perpetual feu^c. And it is the opinion of the ablest canonists, that immemorial possession of feus of tithes is good, to presume the right to have been granted before the Lateran council, and to secure it to the laymen, as much as if the infeodation itself were produced of a date prior to that council^d; and, with us, the long prescription of 40 years is deemed equal to immemorial possession.

^a Cap. 19. ext. de decim.
^b Sub. Alexander III. anno 1179, Covar. var. resolut. lib. 1. c. 17. p. 80.

^c Cap. 7. ext. de his que fiunt a prel.

^d Covar. ibid.

^e P. 1587. c. 29.

^f July 17. 1678. Monimus.

THIS infeodation of tithes with the stock, was a consolidation of stock and tithes, tho' the tenth of the joint feu-duty is declared to be the tithe^e, for a reason to be hereafter mentioned: but, if it appear, that the lands were ever feued without the tithes, a supervening right to the tithes, included in subsequent charters with the lands, bearing a separate feu-duty for the tithes, will infer no immunity^f; because it is no proper infeodation of the tithes, nor can it be said of them, that they were included with the lands at the time of the feu-right; and much less that they were never before separated; but otherwise the positive prescription, by long possession, would have secured the right.

IT may justly be said, that this infeodation of the tithes is an impropriation of them, and frees the vassal from all burthens on the tithes, in the same manner as if the whole were stock; for the tithes became part of the lay-fee; so that he can only be liable to the feu-duty in his charter. The tenth part of the feu-duty being declared to be the tithes, it may be thought, that the same is subject to the minister's stipend, reserving to the feuar retention against the superior of that tenth, or so much of it as is allocated to the minister for his stipend. But that division of the nine parts from the tenth, was on-

129. Whether, in such rights, is the tenth of the feu-duty to be localised to the minister, or wholly belongs to the superior.

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ly a temporary expedient to secure the tenth part of the feu-duty to the ecclesiastical person, in place of the tithes, for his maintenance, as appears from the clause in the statute 1587, touching that point; for, by the preceeding part of the statute, the tithes are reserved to the ecclesiastics, and so it was necessary to ascertain their quota, or share of such feu-duty, payable for stock and tithes: and therefore, at this day, there is no use for this distinction, and no part of such feu-duty is ever allocated to the minister's stipend, but is wholly payable to the superior, in the same manner as other feu-duties. Mr. Forbes indeed takes notice of a decision, where the court of commission localled the tenth part of such feu-duty to the minister's stipend, reserving to the heritor relief against the superior for the same^a; but this hath not been observed as a precedent, since the superior would thereby lose part of his feu-duty, which the legislature never intended: nor is the vassal liable for any part of the minister's stipend, in cases where the tithes are fully included with the stock.

^a Treatise of tithes, part 2. c. 6. p. 296. March 1684. heritors of Tulliallan, cont. Colvil.

130. If the right only includes parsonage tithes, the vicarage tithes are not carried; nor, on the contrary, if it includes only the vicarage tithes.

If the right comprehends only the parsonage tithes, the vicarage tithes may be subject to the locality; and, if it concerns only the vicarage tithes, the parsonage tithes may be localled to the minister; but, if it comprehends both, the vassal is intitled to a perfect and total immunity. Only such of the clergy as had right to both stock and tithes, could grant those infeudations; and, for most part, they were granted by prelates or parsons, but not ordinarily by vicars, who cannot be easily presumed to have had lands belonging to their benefices; therefore, frequently, they only comprehended the parsonage tithes, but the vicarage or small tithes were left to the vicar for his subsistence: hence we see, that many of those lands feued, with the tithes included, are still notwithstanding subject to vicarage tithes. At the same time, there are divers vicar-lands in Scotland, and feus were granted of some of them, in the same manner as of other church-lands, with the tithes included; and the above recited act, concerning designation of glebes, expressly refers to vicar-lands^b: and feus of them, *Cum decimis inclusis*, carry the vicarage tithes, but not the parsonage tithes; unless the right to the vicar-land, with the tithes included, is signed likewise by the parson, for his interest in the parsonage tithes.

^b P. 1593. c. 165.

SECTION VIII. *Tithes before Valuation of them.*

131. Tithes; why called the spirituality of the church-benefices.

TITHES were the proper patrimony of the church^c, and, in divers of our statutes, are called the Spirituality of the Benefice^d; because they properly belonged to spiritual men, as those who officiate in holy orders are frequently termed; or, because they were supposed to be due to the church by divine right, and that no laws of temporal princes can prejudice the clergy's claim thereto, according to the judgment of some doctors of the canon law, for they are not unanimous in it. And one of the greatest among them refutes that opinion, and shews, that payment of tithes is only introduced by the pontifical or canon law^e.

^c P. 1567. c. 10. ^d P. 1617. c. 1.

^e Covarruv. var. resol. lib. 1. c. 17. p. 78.

132. How far tithes due to the clergy by divine right.

AND indeed 'tis plain, notwithstanding whatever some canonists may imagine to the contrary, that churchmen have no other right to

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^a Luke x. 7.

^b 1 Cor. ix. 13.

^c Numb. xxvi. 62. xxxv. 2. Deut. xiv. 22. and 27. xviii. 1. et seqq. Josh. xiii. 14. and 33.

^d Gen. xiv. 28. ^e Cicero de natura deor. lib. i. Dion. Hal. lib. i. et 6. Herodot. lib. 2. et 3. L. 2. § 2. ff. de pollic. cit.

^f Ann. 533, &c.

to the tithes, than by the positive law of the country where they are settled, and which, with us, is now limited to a reasonable subsistence, as shall afterwards appear. Their claim to tithes, or any other fund of subsistence, is at present founded in the natural ground of equity, that persons ought to be rewarded for their labours. This is the rule laid down by our SAVIOUR, in sending out his disciples to preach the gospel, viz. that "The labourer is worthy of his hire"; or, in the words of the great apostle, *That they who serve at the altar should live by the altar*^b. It was otherwise by the Mosaic dispensation, whereby the tithes and offerings, with certain cities to dwell in, were given to the tribe of Levi, in place of their share in the division of the land of Canaan^c: thus, they had the same right to the tithes that the other tribes had to their several proportions of the land, which truly was divine, viz. by the grant of GOD, the Almighty Disposer of all things. There were indeed voluntary consecrations, by some of the Patriarchs of old, of the tithes, on particular occasions, as the tenth of the spoils, in case of victory^d. We have likewise instances of the like kind among the Grecians, Romans, and other nations^e; who, I conceive, had it, by communication, from the Jews, as in the case of some other usages. Tithes were not become due by public law in the time of the emperor Justinian; for we have nothing on that subject, in the body of the civil law, that was compiled by him^f.

THEREFORE we have the institution of tithes from the canon law, of which divers regulations still obtain with us, and in other matters we have receded from it, by our own statutes or customs. It is observable, from some instances already given, that we never received certain rules and constitutions of the canon law, even in those times when we owned the pope's authority in spirituals: and which will still farther appear, from the difference that always was between our law and the canon, in the matter of tithes, in divers particulars. At the same time, in questions on this subject, the decisions of the canon law justly have weight, where our own statutes and customs are silent.

133. The institution of tithes proceeded from the canon law.

TITHES were a proportion of the fruits and profits, and chiefly those of lands, (as shall afterwards appear) and, except the tithes included, were all enjoyed by the clergy, and those of religious houses, and were not constituted by infeftment: hence it is said, that they are *Debitum fructuum*, and not *Debitum fundi*, or a claim affecting the fruits, but not a real burthen upon the lands. After the reformation, those who had grants from the king, of the lands and tithes of great benefices, obtained them to be erected into temporal lordships, and took infeftment both for stock and tithes; but still such infeftment does not render the bygone tithes a real burthen, but they remain a personal claim only, as above. The infeftment, in such tithes, vests the party in a feudal title to the same, as an infeftment in the property of the lands vests the heritor with the fee thereof, and each hath the fruits and profits of the lands, according to their respective interests; and when tithes are thus constituted, they can only be carried by infeftment. And even in other tithes, not established in that manner, it is ordinary and expedient to take infeftment

134. Tithes, either constituted by infeftment, or by a personal right.

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ment for the same ; as where a patron conveys the tithes, to which he has right only in force of the statutes 1690 and 1693, and is merely personal in him ; but, after they are constituted by infestment in the purchaser's person, they must pass by infestment.

135. The introduction of tithes into our law, of antient standing.

THE general payment of tithes was enjoined with us by special statute, tho' not very early^a ; but the law of tithes had taken place here, by custom, long before : for a provincial council was holden in Scotland under pope Honorius III.^b by the can. 35. whereof tithes were ordained to be paid to parsons and vicars : there is a copy of the canons of this council said to be in the chartulary of Aberdeen ; and the above act of parliament supposes that the tithes belonged to churchmen, by an established right. It ordains, "That none stop them " from setting their teinds in tack and assedation, to the effect they " may possess the same in their own integrity, on pain of excommuni- " cation by the church, and a fine to the king."

^a Stat. Dav. II. c. 42. Boet. hist. of Scot. lib. 9. et 16. ^b Ann. 1225.

136. Tithes distinguished, in the canon law, into personal, predial, and mixt ; when and how these were exacted.

IN the canon law, tithes are distinguished into Personal, Predial, and Mixt. Personal, was the tenth of the free profit, made by one's industry or occupation, after deduction of all expences^c. Predial, the tenth part of the yearly increase of the ground ; in computation whereof there was no deduction of the expences of seed or labour, as in personal^d. Mixt, was the tenth of young of cattle, or other profits arising from them, as the milk and wool, where likewise no regard was had to the expences. The Personal tithes were due to the parson of the parish, where one's residence or principal dwelling was, and in which he partaked of the ordinances^e. Predial where the lands lay ; and Mixed where the cattle were graffed. Personal tithes were payable at the end of the year ; Predial, when the fruits were reaped^f, and Mixt when the young were weaned, or the wool shorn, &c. It is a rule, that neither the best nor the worst of the kind should be given for tithes, but of the middle sort.

^c Cap. 7. c. 26. ext. de decim.

^d C. 26. c. 28. ext. de decim.

^e C. 20. ext. ibid.

^f Cap. 7. ext. ibid.

137. This distinction not much followed with us ; regularly we allow of no personal tithes, and of predial, only that of corns called parsonage tithes.

WE follow not this distinction precisely, for it does not appear that ever personal tithes obtained with us ; except in some special cases, by immemorial use of payment of a proportion of the profit of a certain manufactory, in name of vicarage tithes, as is after-mentioned ; and of predial tithes, only those of corns are regularly due, which we term Parsonage Tithes, as being due to the parson, *i. e.* parish minister, or others having right to the Parsonage, or Parochial Benefice : these are otherwise called *Decimæ rectoriæ*, as being due to the rector, as the parish-minister is sometimes named ; and *Decimæ garbales*, as being the tenth sheaf or shock of corn, from *Garba*, which signifies a sheaf.

138. At what time of the year tithes antiently exigible.

ANTIENLY, tithes became due with us of corns after they were cut down ; so that if the bishop, or other beneficed person, died after Whitsunday, but before the corns were shorn, he had no right to any part of that year's tithes, in the same manner as by the canon law ; because then, and not till then, the tithes could be drawn, and carried off^g : and, for the same reason, the vicarage tithes were not due till they could be intermeddled with by the tithe-master. But there- after two terms were introduced for parsonage tithes, *viz.* Whitsunday, when

^g March 21. 1628. Murray. June 24. 1630. Scrimzeour.

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when all the corns were presumed sown, and Michaelmas, when they were all reaped. This was regarded as a rule, both as to the beneficiary's right, at his entry to the benefice, and his removal from it, first, by custom^a, and afterwards ascertained by statute^b, as is above set forth.

^a Decem. 2.
1671. White.
^b P. 1672.
c. 13.

WHEN those tithes are payable in kind, or the *ipsa corpora* of the corns drawn, the owners of the corns, eight days after they are shorn, may require the tithe-master, or his factor, at his dwelling-place, being within the parish, or the next adjacent village, to tithe the corns within four days; and, in default of their coming, may, in presence of two witnesses, separate the stock from the tithes, and carry off the stock for their own use, and leave the tithe-sheaves on the ground, which they are to preserve undestroyed for eight days longer. If this order is observed, the party is declared free of any spuilie of the tithes, or wrongful intermeddling with them. If the titular of the tithes does not live in the parish, or has not a factor there, as above, whose name and place of residence is publicly notified in the church, the owner of the corns may proceed to separate the stock from the tithes, and do in manner above mentioned. Corns are to be tithed at three several times, if the owners think expedient, *viz.* the croft infield, at one time, the bear or barley at another, and the outfield corn at another time; and the requisition may be used, when about the tenth part of each sort is standing unshorn^c.

^c P. 1617. c. 9.

139. The rule in drawing the *ipsa corpora* of tithes, and the penalty of transgressing it.

ALL other tithes, besides these of corns, are called with us Vicarage-tithes, which comprehend those termed Mixt-tithes in the canon law: and as the parsonage tithes are called, with us, the Great Tithes, so the vicarage is called the Small Tithes, as being inconsiderable. They came under the denomination of Vicarage-tithes; because, where a parish was either of itself a considerable benefice, or annexed to a greater benefice, the small tithes were allowed to the vicar, who supplied the cure, for his maintenance. Vicars were either for life, termed Perpetual, and then the vicarage was considered as a separate benefice, at the presentation of the patron; or they were Temporary, and during pleasure; those had either a salary allowed them, or the vicarage for their service, according to agreement, and alterable at pleasure. Those last were properly termed Curates, as serving the cure of the parish, but were not, strictly speaking, vicars; because, by their admission, they had not a proper title to the vicarage, but only to the allowance settled on them by the beneficiary, *viz.* the prelate or other person intitled to the benefice, whether that was the vicarage, or part of it, or a pension in money.

140. Vicarage tithes, of what subjects claimable; how the right to them acquired or lost.

^d June 16.
1666. minister of
against
lord Elphinston.
^e Feb. 11.
1665. Scot.
Nov. 29.
1678. Birney.
Nov. 24.
1665. bishop of Isles.

THE ordinary subject of vicarage tithes is stirks, *i.e.* calves of one year old, lambs and wool^d; but other things, as milk, lint and hemp, or fish taken in a certain bay or creek, or even salt, or the profit of weavers looms, may, by prescription, or immemorial use, become liable to vicarage; and the quota of vicarage tithes may likewise be altered from the tenth, to any other proportion, by prescription^e; and freedom from vicarage may be acquired by prescription of liberty, thro' non-payment for 40 years, or legal demand made during that space; and which is conform to the canon law, as it takes place in

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other countries^a: and the rule is, that *Unumquodque eo modo dissolvitur quo colligatum est*. Vicarage tithes being due by custom, may be taken off by disuse^b; and one part of a parish, being in use to pay such tithes, will be no rule for the rest who were not^c. If there are not so many as 10 calves, &c. the tenth of the value is due as the vicarage tithe.

^a Covar. var. resol. lib. 1. c. 17. p. 82.
^b Fount. July 24. 1678, laird of Grant.
^c Nov. 28. 1676. Sheil.

141. How far does the negative prescription cut off the claim of parsonage tithes, or procure an immunity from bygoners, and in time coming.

PARSONAGE tithes are due out of all lands, unless a special exemption is shown, because they are due to the clergy, or others in their right, by public law: hence the negative prescription, by one's being out of use of payment for 40 years, will not acquire an immunity in time coming; nor indeed sometimes from bygoners, within 40 years of the date of the summons, more than an immunity from customs or duties, laid on by public law, could be so acquired^d; but, if there is any colourable title of exemption, or if the heritor can plead a presumed tacit relocation, from use of payment of a tithe-duty, tho' ever so small; or, if the lands were immemorially out of use of payment of tithes, he will be free from bygoners, preceeding the date of the citation^e, tho' he should be subjected in time coming. And if the minister's title was not limited by a decree of locality, use of payment to him will be deemed a consideration for the whole tithes, and free the heritor from bygoners to the titular or patron^f.

^d Feb. 7. 1666. Earl Panmuir. Jan. 19. 1669. Earl Athole.

^e June 16. 1681. Drummond, obf. by Fount.

^f Arg. 8. Nov. 1743. Methven.

142. Tithes stated at the fifth part of the rent, when not drawn, nor valued; vicarage regularly presumed due.

OUR law supposes vicarage to be regularly due, as well as parsonage tithes, and therefore the rate of tithes is declared to be the fifth part of the constant rent, without distinguishing as to the vicarage^g. Vicarage is said to be local, because, in some places, certain subjects are tithable that are not in others; but still the ordinary vicarage must be presumed to be due out of the things subject thereto: if it were otherwise, it had been unjust to value tithes, in general, at the fifth part of the rent, since, in many places, vicarage tithes might not be in use of payment.

^g P. 1633. c. 17.

143. The positive prescription, on a proper title, acquires the same right to the tithes, as if they had been purchased from the titular.

THE positive prescription takes place with us, to cut off the proper titular's right, even as to parsonage tithes. Thus, if one upon an infestment in tithes, tho' a *non domino*, or not proceeding from the right owner, has possessed his own, or other mens tithes, 40 years, without interruption, he will acquire as perfect right thereto, as if he had purchased them from the right owner; because the act of prescription^h extends to all heritages, without limitation or distinction; and the tithes being contained in the infestment, it must be a good title for prescription of them.

^h P. 1617. c. 12.

144. How far infestment requisite to the prescription of tithes, purchased from one as patron.

IT may be a question, how far infestment is requisite as a title of prescription of tithes, acquired from one as patron; and, I conceive, that tho' they be established in a patron's person, without infestment, specially in the tithes, but as accruing to him by the statutes 1690 and 1693, yet, when they are purchased from a supposed patron, an infestment is necessary to acquire the same by prescription; for otherwise it is only a personal right, which must fall with his author's; and accordingly it was found, that prescription of such tithes could not proceed on a disposition without infestmentⁱ. But prescription of

ⁱ June 25. 1745. Chatto.

tithes.

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tithes could not defend one against localling a proportion of the minister's stipend upon his lands in due course; and much less can it free the heritor from the stipend already constituted upon the same.

SOMETIMES, however, an heritor may be freed from bygoness of the minister's stipend localled upon his lands, even tho' the decree of locality was in vigour in other respects: thus, for example, if one has acquired the lands and tithes from an heritor who had the same *cum decimis inclusis*, and had not been in use of payment of the stipend thereon localled, he must be freed from bygoness, on account of his *bona fide* possession; but may be subjected in time coming, if the original author was only a lord of erection; or, by his charter afterwards appearing, liable in a separate duty for the stock and tithes, and so could not have the benefit of a right *Cum decimis inclusis*; which could be the only reason that a proportion of the stipend was allocated upon his lands. But no other right to tithes can liberate the heritor from the minister's stipend, even as to bygoness, for there could be no *bona fide* possession in such case, since every man must know that the tithes, tho' purchased by him, are subject to the minister's stipend.

145. Bona fide possession may sometimes liberate the heritor from bygoness of the minister's stipend.

a Ann. 1179.

b C. 7. ext. de his. quæ fiunt a prel.

By the canon law, laymen were incapable to possess tithes after the third general council of Lateran^a; and therefore the positive prescription could not take place, because they could not have *bonam fidem*, contrary to the public law; but, by way of infeodation of the tithes with the stock, prescription might proceed even after that council^b: for this reason the lords of commission sustain rights to lands, with the tithes included, flowing from churchmen of old, sufficient to infer an exemption, without enquiring whether they were before the Lateran council or not, as was above set forth.

146. The case of prescription of tithes by the canon law.

c C. 7. ext. de dec.

THE prescription of tithes, by the canon law, did not extend to those of *Novalia*, or new improved lands; so that one who, by 40 years possession, upon a competent title, had acquired right to the tithes of his arable land, could not thereby claim the tithes of grounds afterwards taken in and laboured, called *Novalia*^c; but which, I apprehend, would not take place with us, since the positive prescription has the same effect as a purchase from the real titular of the tithes; and must therefore carry a right to the whole tithes that are at the time, or shall supervene; and consequently include *Novalia*, or tithes arising from improvement of the lands,

BUT a right to tithes, by purchase from the titular, more than by the positive prescription, gives not the privilege of immunity from a future augmentation of the minister's stipend; for they are still in their due order subject to it; so that such purchase, by no means, gives the heritor a right equal to that *Cum decimis inclusis*. There is an impropriation of the tithes, when they are included in a feu-right with the lands: whereas, in a separate purchase of the tithes, they still retain their own nature; and the patrimony of the church must be subject to the legal maintenance of the churchmen, in the same manner as if they were still in the hands of the titulars. Of this I shall discourse more fully afterwards.

147. One acquiring his tithes still liable to the minister's stipend in due order.

56 An Institute of the LAWS of SCOTLAND. BOOK II.

148. The maxim *decimæ debentur parochio*, how applicable to the patron, upon the act 1690.

It is a maxim in the canon law, and which we followed, that *Decimæ debentur parochio*, viz. the tithes are due *De jure communi*, or by course of the common law, to the incumbent, or minister of the parish, where they locally are; the parsonage tithes to the parson, or those in the right of the benefice, and the vicarage to the vicar: and this is supposed to be our law, by the statute, which declares, "That the meddling with the tithes or rents of a benefice, without a right from the parson or vicar, shall be a point of Ditty," i. e. a crime indictable before the temporal courts^a; but it is derived to us from the canon law^b, as most of our antient law touching tithes was. This rule holds only presumptively, so that if the right of another is clearly made out, it will take place; but, unless a full proof of another's title appear, the parson or vicar was preferable^c.

^a P. 1489.
^c 7.
^b Tit. ext. de decimis.

^c Feb. 4. 1681. Robertson. June 27. 1665. Ferguson. Jan. 14. 1664. Johnston.

At present, patrons have right to the tithes of the respective parishes not heritably disposed, of which I have already discoursed; therefore the maxim now takes place in favour of the patron, as in the minister's right; so that the tithes within the parish are presumed to belong to the parochial benefice, in exclusion of all others, unless their right be clearly proved. This so far held by the canon law, that where the tithes of a certain territory belonged to another than the parson, yet the tithes of improvements, called *Novalia*, belonged to the parson^d.

^d C. 24. et 30. ext. de decimis.

149. No allowance given for the expence of labour, or otherwise, in either parsonage or vicarage tithes; one may employ his ground, either in labour or pasture, and so vary the tithes.

BOTH parsonage and vicarage tithes are due, without deduction on account of expences of labour, or burthens affecting the ground, or other expences whatever. This, as is above-mentioned, was likewise the case in the canon law; but some eases are given to the heritor, when he pursues valuation of the tithes, as shall hereafter be shown. One cannot be hindered, by the titular of the tithes, tho' he is in possession of drawing the *Ipsa corpora*, or tithes in kind, from using his ground as he shall see cause, and employing it either in tillage or pasture, whereby the nature and extent of the tithes will alter of course.

SECTION IX. Valuation and Sale of Tithes.

150. Before decree of valuation of the tithes, the fifth of the payable rent regularly due, as the value or rate of them.

If the heritor has not a decree of valuation of his tithes, they will of course rise and fall with the rent, and the titular, who is not in possession of drawing the tithes, has action for the fifth part of the rent, that being declared, by statute, the rate of the tithes^e: but, otherwise, if he has such decree, the valued tithe-duty will only be due, unless the decree of valuation is reduced as collusive; which can only be done in the case where the valuation was led, with diminution of a third of the just rent as it was at the time^f. As the records of the court of commission for tithes were burnt, the lords of session, as a court of commission, sustain decrees of valuation by the sub-commissioners, appointed by the king in the year 1632; before the act establishing that court, with a power of valuing and selling the tithes, tho' such might otherwise have been liable to challenge, the necessity of the thing, and favour of the case requiring it^g.

^e P. 1633. c. 17.

^f P. 1661. c. 61. and other acts renewing the commission.

^g July 30. 1746. Murray.

THE

^a D. P. 1633.
c. 17.
^b P. 1693.
c. 23.

^c P. 1633.
c. 17.

THE privilege therefore of the heritor's leading a valuation of his tithes is considerable; tho' formerly tithes, of which the churchmen were in the possession, could not be valued^a, yet now all tithes may be valued, but some cannot be bought^b. In a summons of valuation, which must be before the lords of session, As commissioners for plantation of churches, and valuation of tithes, the minister, and, in case of a vacancy, the moderator of the presbytery, and the patron or titular, and likewise the tacksmen, if the tithes are under tack, must be called. The rule for valuing is, That where the tithes and stock are not separately known, and therefore valued jointly, the fifth of the constant rent is decreed to be the value^c; that being supposed, by our legislature, equal to the tenth part of the increase, and of other subjects, out of which tithe is due.

151. Valuation of tithes; and procedure, in order to a decree of valuation.

^d Jan. 14.
1747. Clark.

^e Feb. 17.
1745. feuars of Dalkeith, both objected by Falc.

^f Cap. 8. ext. de decimis.

^g July 11.
1739. heritors of Calders.

^h Feb. 1.
1738. Dr. Douglas.

BUT, in stating the rent, the improvements made by inclosing with stone-dikes and ditches, whereby the ground itself is not intrinsically meliorated, is not considered, but what the lands would be worth, if such inclosures were not on the ground; and, if the ground yields a greater rent, by reason of some accidental advantage which may be withdrawn, the rent is considered without regard to that benefit; the reason of all this is, because, what depends on the industry of the person, resembles personal tithes, which regularly are not due, and what is accidental cannot be deemed the constant rent of the lands; and, for this last reason, it was not sustained as a ground for increasing the rents in order to fix the quota for valuing the tithes, that the tenants were bound to pay the cess, due out of the lands, without allowance of the same in the rent, the land-tax being accidental, or at least not a perpetual burthen ascertained by law, but only imposed from year to year^d. But no deduction is allowed to the heritor, on pretence that the land lies near a borow, and, by the conveniency of their dung, yields a greater rent; for, the community being of perpetual duration, the rent, even increased on the above occasion, must be deemed constant, and perpetual too, and must therefore be the rule for valuing the tithes^e.

152. Deductions allowed on account of improvements; the tenants paying the cess, besides their rent, not regarded.

OUT of the rent are deducted cote-houses kept up by the heritor, because, whenever he pleases to let them fall, the rent of them is gone; nor is the rent of a smithy or change-house considered, for the same reason; nor mill-rent, because it is truly industrial, and would be of the nature of personal tithes. And tho', by the canon law, *novalia*, or new improvements, were subject to tithes^f, yet deduction was allowed, by the commission, of the rent of a loch, drained some years before the action, and made arable, as being tithe-free^g; nor is the new advanced rent the rule for valuing the tithes, but the old rent, or what may be supposed the constant rent of the grounds^h.

153. The rent of cote-houses, smithies, change-houses and mill-rent, not computed.

BUT where the tithes are separately known from the stock, as being payable in rental bolls, they are valued apart and severally, and there is to be deducted, out of such valued duty, the fifth part, as the king's Eafe. The reason inductive of this ease was, because, by these rental bolls, the tithes were lett at an extravagant rate, to which heritors frequently agreed, to avoid the inconveniency of having the

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56 An Institute of the LAWS of SCOTLAND. BOOK II.

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^e P. 1633. c. 17.

^f P. 1661.

c. 61. and other acts renewing the commission.

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154. The king's ease; in what cases to be deducted.

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tithes drawn ; and therefore, it was thought reasonable to give an abatement. Such valuation of the tithe, severally, may take place, where the same is due by contract between the titular and heritor, or even by use of payment ; for tho', in this last case, the heritor can free himself of such tithe-duty, and the use of payment may be receded from, at the pleasure of either party, *viz.* by the heritor's timely intimating to the titular, that he is no longer to continue such use of payment, or the titular's using inhibition against the heritor concerning the tithes ; yet the tithe is severally known from the stock, which is all that the act requires, in order to intitle the heritor to the king's ease : and therefore, if the heritor, before either of those is done, hath commenced a suit for valuing such tithe-duty, severally, he may proceed in it, and have the benefit of the king's ease ; but otherwise he must value the stock and tithes jointly, and the fifth of the constant rent is the rule for ascertaining the tithes.

155. The rule of valuing the tithes, where the parsonage and vicarage tithes belong to different titulars.

IF the parsonage and vicarage tithes belong to different titulars, they must be separately valued, that so each may have his just proportion. Thus, the parsonage tithes will be estimated at the tenth of what the corns, ordinarily growing on the lands in question, are sold for ; and the vicarage, at what the tenth of the subjects, in use to pay vicarage, is worth *communibus annis*, or one year with another^a : but so always, that the fifth part of the constant rent shall not be exceeded in the whole ; for otherwise there must be a proportionable deduction from each, according to their respective proved values, so as to bring the same to the fifth of the rent : and, if the proved values fall short of the fifth part, the value of the vicarage will be deducted, and allotted to the titular thereof, and the remainder of the fifth be deemed the parsonage tithe, and go to the titular of the same : since, as the fifth of the rent cannot, in favour of the heritor, be exceeded, so neither can the legal estimate, or rate of the tithes, be allowed to fall short of the fifth, in prejudice of the titular of the parsonage tithes, by any other's having right to the vicarage.

^aP. 1633.
c. 19.

156. The king's annuity; no deduction of it in a decree of valuation, but is, in a decree of sale, not debitum fundi.

THERE is no deduction from the valued duty of the king's annuity. This annuity is fix in the hundred of the valued tithe-duty, reserved to the king, in consideration of his majesty's passing from his interest, to challenge the rights of titulars and tacksmen^b : wherefore it was not due out of the tithes payable to churchmen, nor can it be due out of the tithes that were in the king's hands, at the date of the act, since *res sua nemini servit*^c. The reason why the annuity is not deducted out of the valued duty, is, because the titulars and patrons remain still liable for it to the king, and those deriving right from the crown, as intermeddlers with the tithes whereout it is due. This duty of annuity came into the Earl of Loudon's person, by progress from king Charles I. confirmed by king Charles II. after the restoration ; but, complaints having arisen touching the exaction of it, the same was stopt *anno* 1668^d ; however, being a claim still belonging to the king, and those in his majesty's right, the same could not be purchased from the titular ; and consequently, tho' the exaction of it has been superseded, and stopt these many years, yet, when the tithes come to be bought by a decree of sale, there is deduction, out of the valued duty of the king's annuity, and the heritor who purchases

^bP. 1633.
c. 15.

^cFeb. 13.
1708. mar-
quis of
Tweeddale.

^dStair hoc tit.
§ 13.

chases is decreed to relieve the titular or patron of it. This annuity, being only a proportion of the tithes when valued, is no more *debitum fundi*, a real debt, than the rest of the valued tithe-duty, and consequently does not affect singular successors in the lands.

^a P. 1633.
c. 17.

^b P. 1690.
c. 23.

WHERE the tithes are saleable, there is commonly, in the same summons of valuation, a sale of them libelled. If the person having right to the tithes is titular, or has an heritable right, the price is nine years purchase, with deduction of the king's annuity^a; but, if he is patron, only six years purchase is the rule, with the foresaid deduction^b. The rate of purchase was made so low, even as to titulars that had an heritable right, because they submitted their claims to king Charles I. who put that rate upon them by his decree-arbitral; which they had reason to be satisfied with, considering that the rights of those titulars, and lords of erection, were subject to challenge at the king's instance, most of them being granted contrary to law; and, however, it was thought favourable to continue the right with the titulars, subject to a sale, at the foresaid easy rate.

157. A decree of sale of tithes; the rate of purchase, whether in titular or patronage tithes; difference between these: those who have only temporary rights get the interest of the price during their term.

^c Nov. 22.
1721. Hay.

By the king's decree-arbitral, the right of tacks, or temporary titles to tithes, is declared to be conform to the years of the tack to run: but the natural rule seems to be, that the tacksmen, whether from patron or titular, should have only the interest of the price during his right^c; and accordingly the terms of the decrees of sale are, That if the defender cannot give the heritor an absolute and heritable right, he shall only have the interest of the price.

PATRONS get only, by the statute, six years purchase; because truly they had no right formerly, but by agreements with the ministers, or by tacks from them, in the name of confident persons, with their own consent: therefore they get this right, without prejudice to any former rights they had, and with the burthen of the ministers stipends, and future augmentations, tacks, and prorogations of them; and likewise under obligation to sell to each heritor the superplus, or free tithes of his lands, at six years purchase, which is understood with deduction always of the king's annuity.

A DECREE of sale, dated before Candlemas, gives right to the tithes for the preceeding crop, if the summons was executed before Whitsunday that year, and the price bears interest from that Whitsunday; but, if after Candlemas, it gives only right to the tithes for the ensuing crop, and the price bears interest accordingly.

158. From what time does a decree of sale of tithes take place.

If the tithes were constituted by infeftment in the person of a titular, or lord of erection, then, to denude him, it is necessary that the heritor be infeft upon his disposition, in obedience to the decree of sale; but, where the tithes are not so established, but only belong to the titular, or patron by a personal right, as in the case of the patron's right by the late statutes, it would seem, that the decree of sale is sufficient to denude him; tho' it is ordinary for heritors to obtain disposition of the tithes from the patron or titular, and to take infeftments in their tithes, in both cases, and which is the safest course.

159. How is the titular to be divested, pursuant to a decree of sale.

WHERE

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160. In what case is the purchaser of tithes liable to cess.

WHERE the heritor purchases erected tithes, which were established by infestment, and subjected to a proportion of the cess, or land-tax with the lands in the shire, he must of course relieve the titular, or lord of erection, of the proportion falling on such tithes; which must be adjusted by the commissioners of supply.

161. How may the heritor be burthened with the stipend, notwithstanding the decree of sale.

THIS right, by decree of sale, or indeed by any other transmission from the titular, infers no consolidation of the tithes with the stock, but the tithes still remain in the heritor's person, as a separate right, and may be burthened with the minister's stipend, to the extent of the valued duty, failing free tithes within the parish, as shall afterwards appear: thus, tithes still remain in this respect, as dedicated to the service of the church, as occasion shall require; but if the minister hath a legal stipend, the heritor's right, by such purchase, cannot regularly be impeached. It is only the heritor of the lands that can pursue a valuation, and sale of the tithes of the same, and the right acquired by such decree follows the lands, in the persons of all singular successors.

162. All tithes may be valued; but some cannot be bought by an action of sale; what are these unsaleable tithes.

ALL tithes may be valued, but some cannot be purchased, as is above-observed: thus, if lands, belonging to the titular of the tithes, are sold by him, reserving the tithes, or without disposing them, such reserved tithes do not fall under the acts obliging titulars to sell the tithes, but are considered as feu-duties: nor do those acts extend to tithes which formerly belonged to the bishops, and now to the crown, by the abolition of episcopacy, so long as they remain in his majesty's hands undisposed; nor to tithes that belonged, at the time, to borrows, colleges or hospitals, or were mortified to other pious uses; but all these tithes may be valued^a. And no pretence, even that of particular tithes, having been annexed to the crown before the year 1633, will bar a sale of the same, since there is no such exception in the statutes 1633 and 1693^b.

^a P. 1693. c. 23.

^b Arg. 13. Feb. 1751. Anstruther.

163. If the minister is in possession as titular, or has no settled stipend, can an action of sale proceed.

IT is obvious, that the tithes, which are allocated to ministers for their stipends, cannot be bought: but, further, where the minister is in possession of the tithes, as titular of them, he is to remain in possession, until the patron obtain a stipend modified and settled upon him, and, till then, no heritor can pursue a sale of his tithes; because that would divest the minister of the possession, secured to him by the proviso in the statute. But where the minister is not in possession of the tithes as titular, but only of a stipend, or certain tithe-duty by use of payment, it is ordinary for the minister to pursue an action of modification and locality, or of augmentation, when any of the heritors insist for a decree of sale of their tithes; because, after the heritors have purchased the superplus tithes, beyond what is in use of payment to the minister for stipend, it will not be so easy to get an augmentation as before.

SECTION X. *Ministers Stipends; Modification and Locality of them.*

164. The methods prescribed, at first, to pro-

LONG after the reformation, our ministers were very ill provided, the tithes being almost all in the hands of titulars and lords of erection, and tacksmen. To remedy which inconveniency, in some measure,

TIT.VIII. Modification, &c. of Ministers Stipends. 61

sure, small benefices, viz. those not exceeding 300 merks yearly, were wholly allotted to ministers serving the cure at the respective churches^a. Next, the king assumed into his own hands the third part of the revenues of all ecclesiastical benefices, called the Thirds of benefices, whereout provisions were to be assigned to the ministers in the first place, and the remainder to go to his majesty's use: for the disposal and administration of these thirds, commissioners were appointed, called the Commissioners of Plat. Ministers were provided to stipends, by assignments to particular portions of those thirds, under the name of Decrees of Plat^b. But benefices of cure being of laic patronage, and provided to ministers of the gospel serving the cure of the respective churches, were not subject to the thirds^c; that being contrary to the chief intent of levying them, which was for the better support of the ministers. We have a full account of this matter given us by a learned author^d.

vide ministers after the reformation.

^a P. 1572.
c. 52.

^b P. 1567.
c. 10.
P. 1592.
c. 123.
^c P. 1592.
c. 161.

^d Hope pract.
observ. tit. 2.
§ 17, &c.

^e P. 1581.
c. 100. 102.

^f P. 1617.
c. 3.

^g P. 1633.
c. 19. and
subsequent
acts to that
purpose.
^h P. 1707.
c. 9.

ⁱ P. 1633.
c. 19.

AGAIN, it was ordained, that every parish-church should have their own pastor, with a sufficient or reasonable living; and that, before the title of any prelacies should be conferred to any person, livings and stipends should be reserved to the ministers of the churches thereto belonging, or annexed, and which were to be counted in the thirds of those benefices: and all benefices, under prelacies, were to be presented by the king and laic patrons, in favour of qualified ministers^e, and dispositions of the same, any other way, are declared void. This must be understood with the exception of lands belonging to provostries, prebends, chaplainries and altarages, these being reserved to laic patrons, to be conferred to burfars, as above. But, notwithstanding those expedients, till the Commission of parliament for the Plantation of churches was erected, in order to provide ministers with constant local stipends, out of the tithes of their respective parish-churches^f, the ministers were not effectually taken care of.

NEW powers were added to those commissions, in relation to the valuation and sale of tithes, &c^g. At last, the lords of session were appointed Commissioners for Plantation of churches and valuation of tithes, and vested with all the powers and jurisdiction that belonged to the former commissions of parliament^h. This court has the sole power to value and sell tithes, of which I have already spoken, and to modify and local stipends to ministers out of the tithes of the respective parishes. The rule for modifying stipends to ministers is, that it should not be under 800 merks yearly, i. e. 44 l. 8. s. 10 d. Sterling, or eight chalders of victualⁱ; but, if there is a sufficient fund of tithes, the court is not restrained from allotting such stipend to the minister, as they shall judge adequate to the charge. And that the value of the tithes may appear, where there are not decrees of valuation, the respective heritors, that are of age, are to depose on the extent of their rents; and, in default thereof, to be holden as confest, on the rental libelled in the summons; and, as to those under age, the rent of their lands must be proved in a competent way. The fifth part of the rent is esteemed the tithes, and the minister gets modified a suitable stipend thereout, for maintenance to himself, and his successors in office, serving the cure of the parish,

165. The commission of parliament, erected for plantation of churches, thereafter endowed with powers to value and sell tithes, the only effectual course, both for providing ministers, and easing heritors, with respect to the tithes of their lands; the procedure in modifying stipends.

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according to the extent of the tithes, and circumstances of the place; but where the tithes are valued, the heritor can only be burthened to that extent.

IN consequence of the powers granted to the commission, to burthen titulars, patrons, and tacksmen of the tithes, with competent stipends to the ministers of the respective churches, all parish-churches are intitled to be provided with stipends out of the tithes. Hence, even menial churches had stipends modified to the ministers serving the cure, and which, during the vacancy, belonged to those having right to the vacant stipends, by special grant, and not to the bishops, to whose benefices the menial churches belonged^a.

^a Dirlt. decis.
325.

166. The commission's power extends only to the providing ministers with stipends out of the tithes of the respective parishes.

THUS, the inferior clergy were in much better condition than before, and now all parish-ministers have reasonable livings, or its their own fault if they have not. Such is the happy condition of country parishes, where the tithes are to be appropriated to their original use, so far as is necessary for the incumbent's maintenance; and 'tis the province of the court of commission, to modify and local the same. But, as to ministers within borows, who have no landward parish, or new erected churches in parishes, where the tithes are already exhausted by a stipend to the minister of the parish, or to a second minister, in the like case, the commission has no concern in their provisions; those must be endowed out of other funds, or by voluntary contribution of the parties concerned.

167. Tacks set by ministers, at present, cannot prejudice their successors as to the modified stipend; all the heritors liable, jointly and severally, for it, to the extent of the tithes of their lands.

THE statutes limiting the incumbent's power, of setting tacks of the tithes, to three years, without consent of the patron, and to his lifetime, and five years thereafter, with his consent, take no place as to stipendiary ministers. For ministers stipends are free of all tacks and burthens whatsoever; so that no such minister can do any deed, in relation to his stipend, that can have effect in prejudice of his successor in office^b. But since ministers, in possession of the full benefice, are Parsons, the law, in that respect, continues the same as before, reserving always to the patrons liberty to procure a modified stipend to be settled upon them, which will render them stipendiary, as above. If there is only a stipend modified, but not localled on the respective heritors, they are liable *in solidum*, jointly and severally, to the minister, to the extent of their tithes^c, which are at large his fund of payment.

^b P. 1593.
^c 166.

168. If it is localled, each only liable to the proportion allocated upon him; how far has the patron or titular the power of localling the stipend.

BUT it is ordinary and expedient, that the stipend be localled on the heritors, so that the minister may have a decree of locality, as well as modification: hereby each heritor becomes only liable for the proportion of the stipend allocated upon his own lands; and if, in the locality, it is proportioned upon the several town-lands in the possession of tenants, they, and not the heritor, are liable; unless he receive a joint-duty for stock and tithe, or become bound to relieve the tenants of the stipend, or otherwise intermeddle with the tithes. The patron or titular of the tithes hath the privilege of localling the modified stipend upon the free tithes of the respective heritors, and may do it arbitrarily, upon the whole tithes of such heritors as he pleases; unless they have prevented him, by intenting a process of valuation

^c Decem. 3.
1664. Hutchison. Nov.
9. 1677. Rutherford.

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^a P. 1693.
c. 23.

valuation and sale. In this case, the patron or titular can only allocate the tithes of the heritors, that have raised such action, proportionably with the free tithes of other heritors of the parish^a; and the heritors who have prevented, by executing a summons of valuation and sale, may carry on their suit to its final issue, as to the superplus tithes of their lands.

IN localling the tithes, this order must be observed, that the free tithes of all the heritors be first allocated; if these do not suffice, the tithes, to which the heritors have heritable rights, must be localled proportionably with the tithes of the patron's, or titular's own lands: the tithes are free which are not purchased by the heritors, but payable, to the patron or titular, out of other mens lands.

169. The order to be observed in localling the stipend.

^b Ann. 1628.

THE patron or titular hath the privilege to exempt his own lands from any proportion of the stipend, if there are free tithes sufficient; because, truly, as to the tithes of his own lands, his right is properly heritable, being expressly reserved out of the surrender and submission made by the titulars, and lords of erection, to the king^b: therefore, since all the heritors, that have heritable rights to their tithes, are exempted in that case, why ought not the patron or titular likewise, as to the tithes of his own lands? But if he hath sold to the heritors the tithes of their lands, with warrandice against future augmentations, the tithes of the patron's, or titular's own lands, must be localled, before those of such heritors can be subjected, because recourse would be competent to them against him upon the warrandice: but absolute warrandice, in a disposition of tithes, does not comprehend future augmentations, unless it is exprest; tithes, even after they are purchased, being still the patrimony of the church in reserve.

170. The patron or titular may exempt his own lands from the locality, if there are free tithes; the ground of this privilege.

^c June 1730.
Earl of Gal-
loway contra
captain An-
drew Agnew,
in the locali-
ty of Kirkum.

THO' a proportion of the minister's stipend had been in use to be paid out of the patron's own lands, past memory, yet, unless it is by a decree of locality, the patron may relieve his own lands, when the minister insists for a locality, and allocate the whole stipends upon the other heritors, to the extent of their tithes: or the patron may, at his own suit, obtain a locality to the minister, and disburthen himself; because such voluntary payment by the patron cannot defeat him of his privilege; for he might have paid the minister his whole stipend, and exacted the tithes himself from the heritors; and, so far as he did pay, he reserved the tithes of the other heritors for his own behoof, which he may therefore local at pleasure^c.

171. Tho' the patron was in use of payment of a proportion of the stipend, he may exempt the tithes of his own lands.

BUT where there is a decree of locality, localling a part of the stipend on the patron's, or titular's own lands, payment conform, during the years of prescription, will exclude him from all remedy; because he has lost his privilege by prescription, proceeding upon a title common to him with the other heritors, which they are interested to plead against him, in order to save themselves from an additional burthen: but it would seem, that, before prescription is compleated, the patron may redress himself, by reducing the decree of locality, and laying the whole stipend, by a new locality, upon the free tithes of the other heritors, according to the above precedent.

172. What if such use of payment was by virtue of a decree of locality.

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173. If the tithes are under tack, at the time of the decree of locality, the tackfman, subjected to more than his tack-duty, is intitled to a recompence, by prorogation of his tack; the procedure in this.

IF the tithes are under tack, when a modification or augmentation of a minister's stipend is granted, and thereby the tackfman is burthened beyond the tack-duty, the commission is impowered to grant prorogation or prolongation of the tack, for as many years after its issue, as they shall judge a proper recompence for the burthen laid on the tackfman. In order to intitle a tackfman to such recompence, the court of commission once sustained augmentations of stipends, by voluntary agreements between the patron and the minister; because, the stipend being moderate and reasonable, the case was thought the same as if it had been by decree of the commission, and saved the expence of such decree, both to the tackfman and minister^a: but, on appeal, that judgment was reversed, and only augmentations by decrees sustained, to intitle the tackfman to a recompence: and indeed the original statute^b, on this head, expressly refers to burthens imposed on tackfmen of the tithes, by sentence of the commission.

^a June 1732.
Earl of Gal-
loway contra
heritors of
Whitehorn.
^b P. 1617.
c. 3.

174. The expence of the communion elements.

IN decrees of modification, there is a sum generally given for defraying the expence of the communion elements; therefore, if that sacrament is not yearly administered, the money allotted for the elements is not due to the minister for those years wherein it is omitted, but ought to be put to the use of the poor^c.

^c July 21.
1713. parish
of Abdie.

175. Execution upon decrees of modification and locality.

WHEN there is a decree of modification and locality once obtained, the succeeding minister will get a horning, at his own instance, upon production of his act of admission, and the decree of locality obtained by any of his predecessors; whereas formerly they behoved to have Decrees conform, at their instance, in terms of their predecessor's original decree, which form is now abolished, as unnecessary and expensive^d; and now, since the loss of the records of the court of commission, the production of an old horning, upon the decree of locality, is sufficient, in place of the decree itself, to obtain a new horning to charge the respective heritors.

^d Act of fed.
June 22.
1687.

MINISTERS are allowed general letters of horning upon their decrees of modification and locality^e, *i. e.* without mentioning any particular persons, and the charges at their instance are upon 10 days; and, when they have occasion to poind for their rents or stipends, they need only apprise the goods upon the ground of the lands, without necessity to carry them to the market-cross of the next borow, in order to be there again apprised^f, as is the rule in other poindings. Nor is a suspension to be past of special decrees for the stipends, but on production of discharges, or consignation of the sums charged for; and if the suspender, at discussing, is found calumnious, he is to be subjected to a fifth part of the sum charged for, in name of expences^g: but those privileges take no place in favour of assignees or executors, being personal to the ministers, that they may not be diverted from the business of their function by groundless law-suits^h.

^e P. 1690.
c. 13.

^f P. 1663.
c. 21.

^g P. 1669.
c. 6.

^h Fount. June
2. 1696. a
minister's ex-
ecutors con-
tra parishon-
ers.

176. Ministers stipends prescribe in five years.

MINISTERS stipends prescribe in five years after they become due; so that thereafter action can only be sustained for them, upon a proof, by the party's writing or oath, acknowledging that they are still owing, even where the stipend is constituted by decree of localityⁱ; for that

ⁱ P. 1669.
c. 9. July
30. 1678.
Baird.

that vouches only what they are intitled to; but, after five years silence, the presumption is, that such claim is satisfied.

As the tithes are only a proportion of the fruits or rent, and cannot affect singular successors, but only intermeddlers with the rents or fruits, so the minister's modified stipend is only a duty payable out of the tithes; and therefore it can only affect the tithes, and intermeddlers with them, but not the singular successors in the lands, nor the heritor, during a liferenter's possession^a; and indeed, for the same reason, a valued tithe-duty remains still personal, and will not be effectual against singular successors. The valuing only ascertains the quota, but cannot render it of the nature of a feu-duty, or a real debt affecting the ground^b.

^a June 24.
1663. Men-
zies.

^b Feb. 20.
1662. Callen-
der.

177. Modified stipends, or the valued tithe-duty, only a personal claim affecting the heritor, and intromitters with the fruits.

DECREES of modification and locality are indeed granted for a constant modified local stipend to the pursuer, and his successors in office, serving the cure of the church, and such is the express tenor of them: but, notwithstanding, that the intent, at the time, is to fix the stipend, then modified, for a rule in all time thereafter; yet, because circumstances of times and places alter, and the rates of things daily increase, a succeeding minister may pursue for an augmentation of his stipend. But such augmentation will not be readily granted, where decrees of modification or augmentation have been given since the revolution^c; but nothing can hinder the court, upon good considerations, to augment the stipend, in such case, if the tithes can admit it, and the exigencies of the charge require the same; for the rule is, that augmentation of the stipend is granted when the tithes can bear it, and the circumstances of the parish-church seem to require farther encouragement. In localising this augmentation, the same rule is followed as in the original stipend: the free tithes are considered as they are at the time, without respect to the old stipend, which continues as settled by the former locality, and the additional quota is proportioned upon the several heritors, according to the quantity of their respective free tithes.

^c July 24.
1734. Mr. G.
Gartshore,
minister of
Kirkcud-
bright, con-
tra his parish-
oners.

178. Actions and decrees of augmentation; how the new augmentation localised.

SECTION XI. *Divers Particulars relating to ecclesiastical Benefices.*

SOMETIMES, without any decree of valuation, modification or locality, a tithe-duty is in use to be paid by the heritors to the minister, patron or titular: in this case there can no more be demanded, till the heritor is interpellated from that use of payment. This interpellation may seem to be by action, at the patron's or titular's instance, for the fifth part of the rent, as the tithe, for which he may pursue, where there is no decree of valuation; as likewise, may such ministers as are in full possession as titulars. But as the heritor is in possession, by such use of payment, which is a tacit lease, he cannot regularly be put from it, without something similar to a warning; wherefore the competent legal way of interruption of use of payment, is by a previous inhibition of tithes, at the instance of the patron, titular, or minister in possession. This is a writ in the king's name, by letters under the signet, whereby the heritor, and all others, are prohibited and discharged to meddle with the tithes, in prejudice of the tithe-master. Inhibition of tithes is likewise by letters or writs

179. Use of payment of a tithe-duty by the heritor to the minister, without any decree of locality or valuation, interrupted by inhibition.

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from the commissars, in respect of their concern originally in matters relating to the clergy, as having been the bishops officials. It is commonly executed at the parish-church door, where the lands and tithes lie, upon a Sunday, by open proclamation, and affixing a copy upon the church-door. The custom is, to mention in general only all and sundry the heritors and possessors of the lands; but the safest course seems to be to specify their names, and even to execute it against them, as in other summonses.

180. The effect of inhibition of tithes; how past from the inhibitor, without hazard of a spuilie, cannot, at his own hand, enter to draw the tithes.

THE effect of such inhibition is, that it takes off tacit relocation, or use of payment, and is similar to a warning from lands; and it extends to all subsequent years, as well as that wherein it is used: but, if the titular thereafter accept the old duty, the inhibition is understood to be past from. The titular or patron cannot enter, after inhibition, to the drawing the tithes, more than one could, after warning, throw out the possessor at his own hand. It only intitles him to pursue for the fifth of the rent, or to apply for a warrant from the judge ordinary, to draw the *ipsa corpora*, or the tithes in kind. It has its original from the canon law; and 'tis probable, that inhibitions against debtors had their rise from those in tithes.

181. Spuilie of tithes, its consequences, and how avoided.

IT is a spuilie of tithes, where one, in possession of them, is deprived of that possession without order of law. Thus, if the titular was in use of drawing the tithes the preceeding year, it is a spuilie in the heritor to meddle with them at his own hand, otherwise than in terms of the statute^a. And, on the other hand, if the heritor was in possession of them, it is equally a spuilie in the titular to intrude himself into the possession, by drawing the *ipsa corpora*, even tho' he had used inhibition against the heritor to interpel him; for, tho' the tithes are his property, yet he cannot seize them without the possessor's consent, or order of law^b. The consequence of a spuilie is to allow the pursuer's oath *in litem*, as to the quantity and values; but the court frequently restricts it to wrongful intromission; in which case the pursuer can only have the true value, as it shall be proved, or the fifth part of the rent, as the tithe^c. This last is the case, where an heritor lets his lands for a joint duty, for both stock and tithes, and receives it from the tenants; for 'tis plain, that the natural possessor of the fruits, or seizer of the natural possession of the tithes, can only be liable to a spuilie, but the master, who receives the rent for the tithes, is answerable as intermeddler only: nor can the tenant be subject to a spuilie, who, *bona fide*, pays his rent, unless not only inhibition is used at the titular's instance, but likewise a warrant from the proper judge, obtained by him, to draw the tithes; for then the tenant's intermeddling with the tithes, otherwise than in terms of the statute^d, subjects him to a spuilie. On the other hand, tho' the heritor is willing to account for the fifth of the rent, yet that will not intitle him to intermeddle with the tithes, whereof the titular was in the recent possession, by drawing the last year's tithes; for he must bring an action of valuation, and thereon get warrant from the commission to draw his own tithes; which endures till a protestation is obtained by the defender against him, for not insisting in the suit^e.

^a P. 1617.
c. 9.

^b March 16.
1627. Inglis.
Jan. 31.
1628. Naf-
mith. July 7.
1629. Ren-
ton.
^c Decem. 18.
1662. lord
Balmerino.

^d P. 1617. c. 9.

^e P. 1633.
c. 12.

To

To prevent the inconveniency of drawing the tithes, frequently heritors got tacks of their own tithes from the titular, especially of old, before the easy method of purchasing them. These tacks are good against the singular successors of the letter, by analogy from the statute as to lands ^a: but, as to the tacksmen's singular successor in the lands, he is not bound to stand to the tack of the tithes, but may allow the titular either to draw the tithes, or subject himself to the fifth of the rent, till decree of valuation; for the author's personal obligation in the contract cannot bind the singular successor in the lands ^b.

^a P. 1449.
c. 18.

^b June 30.
1680. Adair.

182. Tacks of tithes, effectual against the titular's singular successor; but not in his favour, against the singular successor of the tacksmen in the lands.

TITULARS, or others having right to tithes, or to a duty payable for the tithes, as likewise ministers for their stipends, have an hypothec on the fruits, for the tithe-duty or stipend: hence any intromitter is liable for the whole, provided the tithes intermeddled with extend to so much; or that he hath granted tack of the lands, stock and tithes, tho' for payment only of interest due to him; for the case is the same as if he himself was in the natural possession: thus, an improper wadsetter, in such case, was found liable for the stipend payable out of the whole lands ^c. In all cases, the heritor, who receives a joint tack-duty for stock and tithe, is liable to the minister or titular; but the tenant who pays it was not found liable, even tho' the payment was made after inhibition intimated to him, or citation used against him by the titular; for that he could not know how much to retain for the tithes ^d; but it would seem that such payment should be deemed collusive, and *mala fide* made after the tenant knows, in manner above, the titular's or minister's right: and as to the difficulty in relation to the quota, the tenant ought to have raised a multiple-pounding, and kept the whole rent till the proportion was adjusted.

^c March 21.
1633. Keith.

^d Decem. 16.
1627. Hepburn.
March 21. 1628.
Murray.

183. The hypothec competent to the titular, or minister for the tithes or stipend; how far tenants, who pay a joint duty for stock and tithe, or purchasers of the corns, liable upon it.

It would seem, that purchasers of the fruits, *bona fide*, as of corn in the market, are not liable to the titular tacksmen or minister for the tithes or stipend; nor persons who, upon the heritor's precepts, receive the joint-rents payable for stock and tithe, for payment of a debt due to themselves, or for other just and onerous causes; for that were an interruption of commerce in moveables of that kind. But a purchaser of corns on the ground, in stouks, or in the barn-yard, or of whole boat-fulls of fish newly taken, is liable, to the extent of the tenth of his intromission, for the tithes, in virtue of the foresaid hypothec ^e: because he ought to have known, that, by law, they were subject to tithes, and therefore he bought upon his hazard. As the tithes are a proportion of the fruits, the titular or minister has a tacit hypothec for the same upon the whole, as I have taken notice elsewhere ^f: this we have from the canon law ^g.

^e June 24.
1662. Ver-
ner. Decem.
13. 1664. bi-
shop of the
isles.
^f Lib. 1.
tit. 17. § 13.
^g C. 28. ext.
de decimis.

^h P. 1489.
c. 9.

ⁱ P. 1597.
c. 281.

ERECTED tithes are liable to a proportion of the land-tax; and indeed, even of old, all benefices were subjected thereto by act of parliament, without consulting the pope ^h; which was not the case of most popish countries. And it would seem, that the clergy, (under which were comprehended all beneficed persons, secular or religious) and their feuars, bore the one half of all taxations; for, after the reformation, the spiritual estate, titulars, and lords of erection of prelacies, were subjected to such proportion for some time ⁱ. But now the cess, which took

184. How far tithes subjected to a proportion of the land-tax.

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took place of the land-tax, is imposed conform to the valued rent, without regard whether the lands formerly belonged to the church or not, or to whom the tithes of the lands belong. Only, where erected tithes make a part of the valued rent of the shire, the titular, or other tithe-master, must pay his proportion corresponding thereto; and, after a sale of the tithes, the valuation, in as far as concerns the tithes, must naturally be transferred on the heritor who makes the purchase, and must bear all the burthens thereafter accompanying the subject.

185. Even in times of popery, church-benefices subjected to burthens by statute.

WE may observe, from our clergy's being taxed, by act of parliament, in times of popery, in the same manner as the other subjects, that the concurrence of the pope was not necessary in imposing a taxation upon the ecclesiastical state, nor could any burthens or taxations be laid on them but in parliament^a; so that the freedom and honour of the holy church, and spiritual persons, hath been maintained by our legislature, from the encroachments of the see of Rome, as to impositions upon their livings.

^a Stat. Dav. II. c. 42.

I HAVE already spoken of ministers stipends or provisions, as likewise of the king's annuity, both which are burthens upon the tithes; I shall next touch a little upon the duties and burthens incumbent upon ministers, on account of their churches and benefices. It is not my province to explain their spiritual charge, and the duties to which they are bound by their sacred office and function: I shall only observe as to church-discipline, and particularly the sentence of excommunication, how our law stands in respect to its civil effects.

186. The effects of excommunication as to one's civil interest.

PERSONS excommunicated by the church, in times of episcopacy, if they remained under sentence 40 days, might have been denounced rebels, at the instance of the king's advocate^b; but those statutes were repealed, upon abolition of episcopacy^c. However, the civil magistrate interposed to compel parties, cited before church-judicatories, to appear before them, as likewise to give obedience to their sentence, in divers instances.

^b P. 1633. c. 23. P. 1661. c. 5. ^c P. 1690. c. 28.

187. The civil magistrate prohibited to interpose in order to church censures.

THUS the law stood till the late British statute, by which all civil magistrates are prohibited to compel any person to appear before them, when summoned, or to give obedience to such sentence when pronounced^d. Therefore it is now left to the conscience of persons, whether they shall comply with the orders of church-discipline or not: but, at the same time, it is the undoubted right of the church to debar scandalous and disobedient persons from church-privileges, till they are reconciled; and if they attempt to partake of the holy communion while they are under ecclesiastical disability, I conceive, that the magistrates ought to restrain them by their civil authority, that the institutions of our holy religion may not be profaned, nor the public worship of God disturbed; for the British statute, above-quoted, only concerns the interposition of their authority, in the case of church-censures. I shall have occasion to treat more fully of this elsewhere^e.

^d 10 Annæ c. 6.

^e B. 4. tit. 21. ecclesiast. courts.

BENEFICED

BENEFICED persons, by the canon law, were bound to keep in repair the fabric of the church, if there was sufficient of the revenues, after allowance of a reasonable maintenance to themselves; and, if there was not, the parishoners behoved to make these reparations^a. The same rule held with respect to the houses belonging to the benefice, necessary for their accommodation^b. By our law, the heritors and parishoners must stent or rate themselves, for building and repairing churches^c, so that the vacant stipends are not necessarily to be employed that way. The patron may apply the vacant stipends thereto, as to any other pious use within the parish, but is not bound to do it in preference to other pious uses, as he is in respect to repairing the manse^d. The repairing of manses with us, is one of those pious uses to which the vacant stipends ought preferably to be applied, as above; but under repairing, is not comprehended rebuilding decayed ones, or building new ones where none was before^e. If there is no vacant stipend, or that it is not sufficient for repairing the manse, the heritors must stent, or make a rate upon themselves for that purpose. The same rule holds as to church-yard dikes, which are pertinent to the church; they are to be built, at the expence of the heritors, to the height of two ells, with sufficient styles or entries^f.

188. On whose expence churches, church-yard dikes and manses built and repaired.

^a C. 1, 2, 4. ext. de ecclef. ædific.
^b Can. 9. de consecrat. distinct. 1.
^c P. 1572. c. 54.

^d P. 1663. c. 21.

^e P. 1663. c. 21.
Decem. 16. 1729. Mon-crief.

^f P. 1597. c. 232.

^g Quon. attach. c. 86. P. 1587. c. 27. P. 1592. c. 120.

^h Lib. 1. tit. 2. § 14.

ⁱ P. 1572. c. 54.

^k P. 1593. c. 166.

^l P. 1617. c. 6.

CHURCHES and church-yards are, in many respects, equally sacred and religious, by our law, and it is expressly prohibited to hold courts, fairs or markets in them. The raising affrays in church or church-yard, in time of divine service, infers escheat of movables; manslaughter in them subjects the offender to liferent-escheat, immediately on his being denounced fugitive^g, without running of year and day, as in other cases. These offences are indictable before the justiciary, at the instance of the minister, the king's advocate, procurator for the church, or any other person whatever; and the same is the case as to the invasion of the minister, by the just quoted statute 1587. I have observed the security granted to ministers more fully in another place^h.

189. The pains on committing riots or abuses in churches, or church-yards.

OF old, it was incumbent on ministers to furnish communion-elements on their own expenceⁱ. This could take place only, when they were in possession of the full benefice, and must hold still as to ministers that possess parsonages as titulars; for, as to stipendiaries, their allowance is alimentary, and declared free of all burthens whatsoever^k: wherefore, as I took notice before, in decrees of modification and locality, there is generally a sum modified for the expence of the communion-elements, whereby it justly becomes a burthen on the tithes; but, if that is omitted, or a minister has only a stipend, by use of payment, without any fund for the communion-elements, that burthen seems incumbent on the titular, patron or tackfman of the tithes, who receives the free tithes.

190. On whose expence the communion-elements furnished; what if no sum is allotted for that purpose.

LASTLY, ministers are charged with the custody of the vessels and utensils, necessary for the administration of the sacraments of baptism and the holy communion, and they are answerable for them, and that they be not applied to common uses^l: but the first purchase must be at the expence of the heritors, conform to their valuation in

191. Who bound to purchase the utensils for administration of the sacraments;

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to whom
committed;
may be sold
or exchanged
on occasions.

the parish, as the case likewise is in the purchase of a bell to the church^a, and of all other common concerns of the parish, relating to the church or manse. Tho' those things are deemed sacred, and not to be employed in profane or common uses, while they remain set apart for the service of religion, yet they are under the rational administration of the heritors and church-session: therefore they may be sold and exchanged, when they become old or useless, in order to furnish others that may better serve the purpose. Thus it was allowed, by the canon law, to alien the ornaments and vessels of churches, when necessity or expediency required it^b.

^a Feb. 15.
1642. Inner-
keithing.

192. How far
the church
deemed the
property of
the heritors
of the parish.

THE church may be deemed *nullius*, in the property of none, as being a thing sacred, according to the just decision of the civil law: but, as it must be subservient to the minister, in the exercise of his function, so a kind of property in the same belongs to the heritors of the parish, in order to their own and their tenants attendance on the divine service therein; and they are intitled to have the room in it divided, and a proportion allotted to each, according to his valuation in the parish; and if they cannot adjust it amicably, I doubt not, but any one of them may force a division before the judge ordinary. Each heritor must furnish seats for his own family, and for his tenants, and the room in the church must, as an appendant, follow the lands to singular successors

^b Can. 70.
causa 12.
quest. 2.

193. Burial-
places in
churches or
church-
yards; they
may be ac-
quired by
private per-
sons, by pre-
scription, or
otherwise.

BURIAL-PLACES were in churches by the canon law, and are very frequently so in popish countries, from a superstitious notion^c. This was much practised with us, even after the reformation, and is accustomed at this day in some places, and allowed to families of distinction, who have been in use to bury their dead there. A gentleman may acquire a right to a burial-place in a part of a church, by prescription, in respect that the dead in his and his ancestors families have been always buried there, and may obtain his right to it, to be ascertained and declared before the court of session^d; but I doubt if such burial-place could be retained by the family, after their interest in the parish ceases, by sale of their estate; for it would seem, that their privilege in the church must follow their interest in the parish.

^c Tit. ext. de
sepult.

^d July 1743.
Chalmers of
Gadgirth,
contra lord
Cathcart.

194. Church-
yards, how to
be fenced;
burial-places
in them, as
likewise pri-
vate burial-
places. Some
denied a chris-
tian burial.

THE church-yard is more properly used for burying the dead, and 'tis ordinary for the families, of any considerable interest in the parish, to have particular burial-places assigned to them in it for that purpose, which is a kind of property to them; but this privilege must follow the right of their lands in the parish to singular successors. Heretics, and persons guilty of self-murder, or that die excommunicated, or in any mortal sin, are denied Christian burial by the canon law^e. Private burial-places were mostly used among the Romans, and they were termed *Res religiosæ*, i. e. places set apart from common use^f; but might be sold with the ground, where they were situated as pertinent thereto^g, and the purchasers could not apply them to any other use. I have discoursed farther of burial-places elsewhere^h. Church-yards ought to be fenced with walls two ells high, as aboveⁱ, to prevent cattles going in and trampling upon the graves; and likewise ought to be kept under lock and key by the minister, and

^e Cap. 11, 12,
14. ext. de
sepult.
^f Tit. ff. de re-
ligiosis, &c.
^g L. 24. ff. de
cont. empt.
^h B. 1. tit. 3.
ⁱ § 12.
P. 1597.
c. 232.

TIT. VIII. Particulars relating to Benefices. 71

and church-beadle, that idle people may not have access to commit abuses in those religious places; but the minister has right to cut and use all the grafs in it to his own behoof.

FAIRS and markets were in use to be kept in churches and church-yards of old, but that is prohibited by exprefs statutes, on pain of forfeiting the goods, that are exposed there, to the poor^a; and it is most indecent and irreverent to use them to such purpose.

^a P. 1503.
c. 83.
P. 1579.
c. 70.

195. Fairs and markets not to be holden in churches and church-yards.

^b Cap. 9. de consecrat. dist. 1.

^c Can. 16. quest. 1. can. 44.

IN times of popery, cathedral churches could not be erected without licence from the pope; as to other churches, the Ordinary might authorise them^b; and at the same time a sufficient space was to be designed for the church-yard, viz. 40 paces about cathedral churches, and 30 about any other; and after the church was built and endowed, and the church-yard fenced, both behoved to be consecrated by the ordinary^c. There is no doubt, but most of our churches are those which were built in times of popery, or came in place of them, as being rebuilt when they became ruinous: and as to new erections, they must be authorised by the court of commission, as I formerly observed: we have no consecration or formal dedication of them, but the very setting them apart, as public houses for divine service, is sufficient, and ought to command reverence; and our law secures them against abuses, as is above set furth; and, no doubt, any injury committed in them is much aggravated from the place.

196. By what observances were churches erected in times of popery, and how at present.

TITHES, in a manner, were esteemed of divine right, and therefore, regularly, laymen were incapable of them, by the prescription of the canon law, as is above shown; but they pass in commerce as other subjects, by our present law, and ever since our reformation from popery: however, the remains of the privilege of the church is so far maintained, that the right of tithes is still deemed *Jus separatum*, a distinct right from that of the stock; so that, even after the heritor has purchased his own tithes, they continue subject, in due course, to the ministers stipends, and future augmentations, as we have already seen. I shall make some observations farther upon the rights and conveyances of tithes and church-lands in the hands of laymen; for these which are allocated to ministers for their stipends and glebes, or belong to colleges, hospitals, or other corporations, are unalienable.

197. Tithes esteemed with us *jus separatum*, from the lands or stock.

^d March 27. 1628. lord Blantire.

^e July 8. 1673. Montgomery.

SINCE tithes, which were erected into feudal rights with the lands, in favour of lords and titulars of erection, by infeftments holden of the crown, could not be validly transmitted otherwise than by infeftment; a personal right of such tithes to a creditor, until payment of his debt, could not be effectual against a singular successor to the cedent^d. And, even where they are not erected, the rights of them are governed, for most part, by the same rule with rights of lands: thus, subtacks of tithes, granted by a tacksmen from a bishop for five years, and thereafter, till payment of a sum of money, or from three years to three years, and thereafter during the not payment of a sum, were found null, in a question with a singular successor in the tithes, after the first five or three years; because, thereafter, they wanted a determinate issue essential to all tacks^e. There was this difference between tacks from ecclesiastics, and those from laymen, that the first were

198. Erected tithes pass by infeftment; tithes, for most part, governed by the same rules with rights of lands; the *tempus indebitum introitus*.

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were binding on the successor in office, tho' not clothed with possession in the granter's life, provided the term of entry was past at his death; whereas tacks, not completed by possession, in the common case, are not good against the singular successors of the letter; but tho' the term of entry should happen to be after the granter's death, they are effectual against his heir: for the maxim, in tacks concerning *Tempus introitus indebitum*, that the term of entry cannot be after the letter's death, only holds in ecclesiastics, as to tacks granted by their predecessors in office^a, whom their successors do not represent.

^a June 18.
1629. Dun-
bar.

199. Tacks of tithes can only be prorogated during their currency.

It is singular in tacks of tithes, that they may be prorogated or prolonged for many 19 years by the commission, on account of new augmentations of stipend; but, unless the prorogation is granted during the currency of the tack or lease, it cannot at all take place; because an expired tack cannot be prorogated, the same becoming extinct.

200. Titulars and patrons compellable, by process, to sell tithes only to the heritors of the respective lands, whose interest cannot be prejudiced by selling them to strangers.

TITULARS of tithes are not compellable to sell the tithes of other mens lands, but to the heritors of those lands for the time. They were called Titulars, because they had the title of the benefice, or tithes thereto belonging, without the office: hence, all that have heritable rights of the tithes of other mens lands are called Titulars: the patrons, since the statute 1690, are titulars, and indeed the ministers, that possess the full benefice, are said to possess as titulars thereof^b, in this general sense. But, in the common acceptation, titulars are understood laics, that have an heritable right to the tithes of other mens lands, otherwise than as patrons by the statutes 1690 and 1693; and those are intitled to nine years purchase, with deduction of the king's annuity; whereas patrons must sell their right to the superplus tithes of the parish at six years purchase, with the same deduction: these statutes oblige those patrons only to sell the superplus tithes at that price, who got right thereto by virtue of these acts, and had no right to the same before. When those titulars, by voluntary conveyance, alien the tithes of other mens lands to others than the heritors, the disponees become in the same case as their authors, and are liable to sell to the heritors their tithes, either at nine or six years purchase, according as they had an heritable right to the tithes before the act just mentioned, or only as patrons acquired it in virtue of those acts; because the privilege, granted by law to the heritor to make such purchase of the tithes of his lands, always accompanies the heritor, and is effectual against the titular for the time, in whoever's hands the tithes come, since he can have no better right than his author.

^b P. 1693.
c. 25.

201. The tithes of one's own lands become his property, still subject to augmentation of stipends, in due order.

BUT, after one has acquired right to the tithes of his own lands, they become his property: hence, if, thereafter, he sell the lands, reserving or not disposing the tithes, the disponee to the lands cannot compel the disponent to sell the tithes, more than a vassal can his superior to sell a feu-duty^c; because, after the heritor has bought the tithes of his own lands, they become his property as much as the lands, or any other thing belonging to him, affected with the burthen of new augmentations of the minister's stipend, in due course, as is already mentioned.

^c P. 1693.
c. 23. Feb.
27. 1672.
Scot.

THE

THE presumption lies, that where one, having right to lands and tithes, disposes the lands without mentioning the tithes, he thereby reserves the tithes, which still remain a separate right; but this presumption may be taken off by contrary stronger circumstances. Thus, if the bargain was struck at so many years purchase, and the whole rents counted in the rental, or if the lands were set for a joint duty, for stock and tithes, and the dispositive is assigned to the tenants tacks, this would carry, by implication, a right to the tithes^a.

^a P. 1693.
c. 23.
Feb. 27.
1672. Scot.

ABSOLUTE warrandice, in a disposition of tithes, affords no recourse upon an augmentation of the minister's stipend, because that burthen proceeds from the inherent quality of the subject; and, for the same reason, such warrandice will not be effectual in a disposition of church-lands for recourse, on account of a designation of them for a glebe to the minister^b; for church-lands are as much subject to such designation, as the tithes are to the stipend: but, if they are not denominated church-lands in the disposition, it would be otherwise, as is noted in the case above referred to.

^b July 1.
1676. Auch-
intoul.

THE difference between church-lands, in the hands of laymen, and temporal, according to our law at present, are, 1. The superiority of all church-lands is declared to belong to the crown, by the act 1633; so that, notwithstanding the vassal, and his ancestors or authors, have held of the lords of erection ever since the date of the statute, he may take the benefit of it, and return to the crown, being of the nature of *Res meræ facultatis*; unless he has, in terms of the exception in the later statute^c, consented to a new investment of the superiority, in favour of the lord of erection; for such consent by the vassals, as to his majesty, hath the effect of a resignation of the property, in favour of the lord of erection, to be holden by him of the king, and must therefore exclude them for ever from holding thereafter of the crown. The lords of erection, in their surrender and submission, reserved expressly the superiority, as a title to the feu-duties, till redemption, and they become absolute superiors, by such consent, to their new investment from the crown.

^c P. 1661.
c. 53.

2. CHURCH-LANDS are liable, preferably to temporal, to the designation of manse, glebe, and grass, to the minister, as I observed formerly.

3. THE small vassals of church-lands have the dues of their signatures and charters taxed to inconsiderable sums; such vassals in Orkney and Zetland, not above 20 l. of valuation, have liberty to possess, by the Udal right, without necessity of renovation of their rights and investments^d. Hence, it may seem, that the udal right is not effectual in other cases, even in those countries, as to making up titles in the persons of heirs; but this right is notwithstanding available, as I have shown at large in another place^e.

^d P. 1690.
c. 32.

^e Sup. tit. 3.

4. CHURCH-LANDS and benefices were of old taxed by one cardinal Bagimont, commissioned by the pope for that purpose; and therefore it was highly criminal, for any subject in Scotland, to make, or cause to be made, any higher taxation, at his getting promotion in

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202. When one sells the lands, without mentioning the tithes, the same not understood to be sold; this may be redargued by circumstances in the sale.

203. The effect of absolute warrandice, in a disposition of tithes, or church-lands.

204. Differences between the state of church-lands, in the hands of laymen, and temporal lands.

205. How the inconvenience of the want of extents in church-lands remedied.

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the court of Rome^a. This, I conceive, was the reason that church-lands were not surveyed, when the old and new retours were settled, in order to ascertain the relief and non-entry of the heirs of vassals, that held such lands of churchmen, and to proportion the land-tax upon them. Bagimont's taxation, contained in each provincial book, (as is mentioned in those old statutes) being probably the rule. In all such cases, church-lands, not being retoured, may seem a great hardship on the heritors of church-lands, because that old taxation is not in use, nor even known at this day; and through defect of the old retour duty, whereby the new is regulated, they may be made liable, in place of the retour duty, for the full rents of the lands, in the case of non-entry, even before citation in the general declarator, and likewise for a full year's rent, on account of the relief; but most church-lands are holden feu, so that, in the above cases, the feu-duty is understood to be the rental, which, in a great measure, removes that inconveniency.

^a P. 1471.
c. 43.
P. 1493.
c. 39.

SECTION XII. *Exemption from Tithes.*

206. Several lands tithe-free, as old glebes feued out to laymen, and rights, cum decimis inclusis; the effect of the words, *nunquam antea separatis*, in such rights.

NOTWITHSTANDING that tithes are due regularly out of all lands, by public law, and that no possible right can be contrived, at present, to exempt them from being subject to the minister's stipend, in their due course, yet some lands, of old, have acquired a total immunity from tithes, and which continues with them as an inherent quality^b. Thus the lands, that were glebes of old, were always tithe-free^c, and many of those, belonging to popish foundations, were feued out to laymen, but still retained the immunity from tithes^d.

^b Jan. 10.
1662. Renton.
^c P. 1587.
c. 62.
P. 1621.
c. 10.
^d Fount.
July 16.
1678. Earl Queensberry.

I HAVE already spoken fully of lands feued, *Cum decimis inclusis nunquam antea separatis*, which I shall not repeat. I shall only observe, that the words, *Nunquam antea separatis*, i. e. that a joint duty was always paid for stock and tithes, is not an useless adjection; for they describe the true nature of the right, since, if it can be discovered, that at any time there was a separate duty paid for each, the privilege takes no place, and consequently, it is impossible any new right can be granted with such immunity; for indeed they are all presumed to have existed before the Lateran council, that prohibited such feus thereafter, as is above related. But tho' these words, *Nunquam antea separatis*, are wanting, the exemption will take place, unless it can be proved, that there ever was a separation of the tithes from the stock: and, if that can be made appear, the immunity will not hold, tho' these words are contained in the right; for the nature of the right, *Cum decimis inclusis*, and not the expression, *Nunquam antea separatis*, is chiefly to be regarded: but the ordinary stile, being as above, points out what the right ought to be.

207. How far the lands that belonged to the knights templars and hospitallers, tithe-free, or lands that belonged to the monks of

THE lands, that belonged to the order of the knights, hospitallers and templars, were exempted from tithes, by the special constitutions of the popes, on account of the important services done by them in the holy wars, for recovering Palestine, or the Holy Land of Judea out of the hands of the Saracens, and other infidels^e, as I have already observed. Some would understand this exemption, only as to such lands as they possessed themselves, but not of those lett to farmers

^e Vertot. hist. des hosp. Liv. I. p. 146. et seqq.

farmers or tenants : this indeed is the case of lands that belonged to the monks of the Cistercian order, and the privilege is accordingly limited by the pope's constitution ^a.

^a C. 10. ext. de decimis.

BUT, as to the lands belonging to those orders of knighthood, their warlike exploits in the service of religion (as the world then understood it) obtained justly repeated grants of privileges from the see of Rome; among which the exemption, from tithes of the lands belonging to them, either in Asia or Europe, was none of the least. The bull itself from pope Anastasius IV. is set down by the above-quoted learned and exact author, which is general of all lands belonging to them ^b; and indeed if it were limited to lands in their proper labouring, it had been of no use, their profession, and constant exercise of arms calling them to other business than manuring the ground.

^b Vertot. do. loco. ann. 1154.

208. The immunity from tithes, to the templars and hospitallers, absolute.

THE monks of the Cistercian order had indeed likewise the privilege of exemption from tithes, but which was restricted to lands in their natural possession or manurance. An immunity of the like kind was of old indulged to monks of all sorts, but which was at last limited to the monks of the Cistercian order, and that only as to lands they had at the time, exclusive of such as they should acquire thereafter ^c. Those monks were at leisure to labour the ground, and commonly did possess it, so that the limitation was no great hardship upon them, but which would seem to have eluded the privilege, as to the fore said knights, in a great measure.

^c D. c. 10. ext. et c. 12. ext. de decimis.

209. That to the Cistercians limited to lands in their manurance.

THIS privilege of exemption from tithes may be either passed from Tacitly, by use of payment of tithes during the years of the long prescription; or Expressly, by renouncing it, and becoming bound to pay tithes out of the lands otherwise free: thus, the templars having been in use, for 40 years, to pay tithes out of certain lands, were decreed, by the pope, to continue in payment thereafter; but, in case they had not paid so long, were declared free ^d. The like in the case of the abbot and monks of St. Andrews, which were of the Cistercian order, as to some lands in their labourage, for which they had been in use to pay tithes for 30 years ^e. The reason assigned is, that every person may renounce the privilege introduced in his favour, and that the payment of tithes so long is a tacit renunciation. It is to be remarked, in the first mentioned case, that it is not put, with respect to lands, in the natural possession of those templars to whom the rescript is directed, but in general; whereas the other, which concerns the monks of the Cistercian order, expressly puts the case as to lands in their proper labourage. And therefore we may conclude for certain, that the exemption granted to the knights templars, and consequently to the hospitallers, whose privileges were the same, was not limited to lands in their natural possession.

^d C. 15. ext. de priv. et excess.

^e C. 6. ext. cod. tit.

210. The privilege of exemption passed from, either tacitly or expressly; but, if entire at the reformation, follows the singular successors in the lands.

BUT if the privilege was entire, and neither expressly or tacitly passed from, while the lands remained with these orders, the exemption follows the lands in the hands of their singular successors ^f. Nor indeed can it well be otherwise, because the public law, by which tithes became due with us, was the canon law, received among us

^f July 15. 1664. Crawford.

in

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in most particulars as to that subject; and consequently those lands being exempted at the time of the reformation, I cannot apprehend how they could have become after subject to tithes, there having been no new law enacting payment of them out of such lands since that period.

211. The difference between the lands that belonged to the Cistercian order, and those of the templars and hospitallers, as to this exemption.

THE above related difference between the lands that belonged to the monks of the Cistercian order, and those of the knights templars and hospitallers, is ascertained by precedents with us: thus, the privilege of exemption from tithes was found to belong to the feuars of the lands of the Cistercian monks, only so far as the same were in their own proper labourage^a; and therefore, in an action of augmentation of a minister's stipend, such lands were found not intitled to an immunity; since that concerned the state of the tithes, and stipend in all time coming, and so could not vary, as the lands were, or were not in the heritor's natural possession^b.

^a Gilm. decif. 110.

^b June 15. 1737. minister of Barry.

BUT, as to temple-lands, they were found tithe-free, unless they had been in use of payment^c, without distinction whether they were in the heritor's natural possession or not: this was consequential to their being found not liable to the designation of a glebe, as above. And its thought, the lands of the monks of the Cistercian order would not be intitled to this last mentioned privilege more than to the other; at the same time it must be owned, that the Cistercian monks, templars, and hospitallers, are conjoined, in some of the decretals touching their exemption from tithes, above referred to.

^c Hope (de decimis) Feb. 3. 1614. lord Wigtoun.

212. The positive prescription of tithes has foundation in the canon law; the effect of it only to exclude the former titular's right.

THO' disuse of a privilege of exemption from tithes, during the years of prescription, will cut it off, yet one cannot, in the common case of lands subject to tithes, by forbearance of payment of tithes, liberate himself from them, as I observed above. In times of popery, laymen were incapable of the right of tithes after the Lateran council. Upon the reformation, indeed, rights of tithes came into the persons of laymen, as titulars of erection, and were transmissible as lay-fees, or other rights of property: but no heritable right can be acquired by the negative prescription; and therefore the heritor's possession of the tithes of his own lands cannot acquire them to him by the positive prescription; unless he had a proper title to the tithes in his person, the right of lands being no title to the tithes, and the positive prescription cannot proceed upon possession, without a title to the subject possessed. Wherefore, if one has a title to the tithes of his own, or other mens lands, acquired from another than the righteous titular, the prescription, by 40 years continued possession therein, will take place; for, by this means only, the true titular's right is excluded, and the party is in the same case, by prescription, as if his author had been truly proprietor: thus, by the canon law, a churchman could acquire, by prescription, to himself and his successors in office, right to the tithes of another parish than his own^d; because all churchmen were equally capable of the rights of tithes. And tho', by the common rule of law, the tithes are understood to be due to the parson of the parish, yet another's right, duly established, must exclude his pretensions, which are only founded on a presumptive title.

^d C. 29. c. 30. ext. de decimis.

SECTION

TIT. VIII. Voidance of Benefices; the Annat or Ann. 77

SECTION XIII. *Voidance of Benefices; the Annat or Ann.*

I SHALL conclude this title, with observing the divers ways whereby a benefice becomes void or vacant. And first, by the death of the incumbent, the benefice is vacant, and there belongs to his representatives, in virtue of his incumbency, all the revenues or rents of the benefice, for the years and terms which he survives. Thus, if he survived Whitsunday, and died before Michaelmas, he had right to the one half; and, if he survived Michaelmas, to the whole of that year's fruits or stipends, by his incumbency.

213. Benefices vacant by the death of the incumbent.

BUT, by the indulgence of our law, the wife and children, or other nearest of kin of churchmen, have right to the Ann or Annat, which is the first term, or half year's rent or stipend, that falls due after the death of the incumbent^a. If the deceased left a wife and children, it divides between her and them, by equal portions, she getting the one half, and they the other; if he left no wife, the whole belongs to the children; and, failing them, to the other next of kin, who will likewise share equally with the wife, when the deceased leaves a wife and no children^b. This being altogether the bounty of the law, requires no confirmation; because it did not belong to the deceased; and, for the same reason, it does not subject the wife, &c. to the deceased's debts^c; tho', at the same time, it goes only to such nearest of kin, as could be executors to the deceased minister by law, and so is exclusive of his kinsmen, on the part of the mother. But, upon the death of any minister, subject to one of the yearly rates, pursuant to the act for raising and establishing a fund for a provision to the widows and children of the ministers of the church of Scotland^d, a sum, equal to the one half of his yearly rate, is due and payable for the half year immediately after his death, by those who have right to the ann, and which is declared preferable to all other debts or burthens that may affect the same.

214. The ann; it divides equally between the widow and children, or other nearest of kin, that might be executors to the deceased.

THE original of the ann appears to have been, that, by the canon law, the first year's fruits of all benefices, after the death of the incumbents, belonged to the pope, or to others, by prescription, privilege or grant from him. In some churches, it went to the behoof of the deceased, viz. for the redemption of his soul from purgatory, according to the belief of the Romish church, and in others to the benefit of the poor^e.

215. The original of the ann in the canon law, and with us.

BUT with us, in times of popery, it appears to have belonged to the king, or patrons of the respective benefices, as insinuated in an old statute^f; and, for certain, it did not then belong to the nearest in kin of the deceased incumbent; because it required that statute to allow it them, in case of the incumbent's dying in that particular expedition: and, after the reformation, we see the first year's fruits of all benefices (those of laic patronages excepted) applied towards payment of the king's horse-guard^g. Now, from the exception of benefices of laic patronages in this statute, 'tis plain, that the patrons had the sole right to the first-fruits of their respective benefices.

^a P. 1672.
c. 13.

^b July 6.
1665. Colvil.
Jan. 22.
1679. Spence.
^c July 16.
1673. Ker.

^d 17 Geo. II.
c. 11.

^e Ext. Joan.
22. c. 2.

^f P. 1546.
c. 4.

^g P. 1584.
c. 137.

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216. The ann at first a full year, as the term, imports; afterwards, limited to half a year.

IT was afterwards allowed to the wife, children, or nearest kinsmen of the incumbent, but restricted to half a year, as is above mentioned: Thus likewise, by the canon law, it was, in course of time, limited to half a year's fruits, to prevent a long vacancy, the other half of the first year's fruits being allowed to the intrant for his subsistence^a; but still it was called, as formerly, the Ann, or Annat, which was likewise the case with us, tho' the term imports a full year's fruits. It is due to all ministers in town or country, whether their stipend or provision is payable out of the tithes, or other funds, the terms of the act 1672 being general and absolute^b.

^a D. extrav.

^b June 5.
1747. Wood.

217. Regulations touching the ann.

THE ann does not extend to the manse and glebe; but, if the glebe was sown by the deceased incumbent, the crop falls to his representatives, as having belonged to him, and not as the ann^c. The benefit of all confirmations of testaments, expedited during the ann, fell under it, but not otherwise, tho' the persons died in the deceased bishop's life^d. But, as to the composition for the entry of an heir, whose ancestor died in the time of the deceased bishop, it must have belonged to the succeeding bishop who received him. Our ministers being only parochial pastors, there is little ground of dispute concerning the ann, especially after the aforesaid statute 1672. Formerly the extent of it was variable, according to the time of the minister's death, so that, if he outlived the first of January, that whole year's rent or stipend fell under the ann^e, which was rectified by that statute, and limited and ascertained always to the next term, that falls due after the incumbent's death.

^c July 6.
1665. Colvil.

^d Nov. 26.
1674. With-
art.

^e July 16.
1665. Colvil.

218. The ann only due, if the minister died incumbent.

THE ann is only due when the minister dies incumbent; for, if he was deprived, or voluntarily renounced the benefice before his death, the ann takes no place; but does, tho' he was under suspension at the time; for still his pastoral relation to the parish continued, and the suspension is only from the exercise of the office, but does not deprive him of either office or benefice^f.

^f Jan. 26.
1670. relict
of Sheils.

219. The case of the widow and children of a deceased incumbent, by the late statute.

UPON the minister's death, who is subject to one or other of the annual rates, pursuant to the late act aforesaid, for raising and establishing a fund, for a provision to the widows and children of ministers, &c.^g his widow is intitled to an annuity, in proportion to the rate to which he was liable, during her life, and continuing unmarried, payable by the collector, as therein mentioned; and if she die before drawing 10 years annuity, his children (if any) are intitled to what remains to make it up; and if he leave no widow, but children, one or more, within the age of 16 years, they are intitled to a sum equal to 10 years purchase of the annuity, that would have fallen to his wife, if she had outlived him, as is thereby provided; and the minister's executory is subject to all bygone rates, preferably to all his other debts, and the vacant stipends are subjected to half a year's rate. This act has received some amendments, for the better execution of it, by a latter statute^h.

^g 17 Geo. II.
c. 11.

^h 22 Geo. II.
c. 30.

220. Benefices void by deprivation of the incum-

IN the second place, benefices become void, by the deprivation or deposition of the incumbent, which disables him from enjoying either office or benefice. In times of popery, it naturally inferred loss of

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of the benefice, as well as the office; because both were alike subject to the jurisdiction and cognizance of the spiritual courts, and the constitutions of the popes equally affected the benefice as it did the office. But, after the reformation, when the benefice was esteemed a civil right, cognoscible in the temporal courts, the deprivation of a minister by a church-judicatory, disabled him not from enjoying the benefice for life, which was considered as the grant of the patron. This was rectified by a special statute, which declares, "That the sentence of deprivation, by the church-judicatories, secludes the deprived minister from the benefice, and the rents and emoluments thereto belonging," and thereby the church becomes void, and is to be declared vacant^a; which is not necessary where the vacancy happens by death, for that is notorious, and admits of no question.

^a P. 1592.
c. 115.

THERE is this singularity, in this kind of vacancy, farther, that the patron has six months to present, after the sentence of deposition is extracted and shown to him^b: for tho' the death of the incumbent might readily come to the patron's knowledge in a reasonable time, yet the deprivation might not, nor could he be certain about it, without seeing the extracted sentence.

^b D. act. 115.

By the canon law, some crimes inferred deprivation *ipso facto*, at the very instant of committing the crime, and from that time the benefice became void, and the incumbent was accountable for the rents from the time of his guilt, so that the sentence is only declaratory: this was the case in heresy, treason, simony, and other atrocious crimes^c.

^c Rebuff.
prax. ben.
part. 3. tit. 1.

IN Heresy (of which Schism is a branch) if the offender, upon his being challenged, acknowledge his crime before the ordinary, and returns to the faith and unity of the church, he is pardoned^d; but after sentence there is no place for repentance.

^d C. 9. ext.
de heret.

BUT, in other crimes, deprivation was only inferred from the sentence inflicting it; and this seems to have been the case with us, after the reformation, as to all crimes, without distinction; for Heresy and Simony are mentioned among the other crimes which are declared causes of deprivation^e. The cognition, in order to the ecclesiastical punishment, belongs now to the church-judicatories, as it did formerly to the bishop.

^e Ja. VI.
P. 8. c. 132.

IT is a rule of our church, that a minister once deposed or deprived, tho' he should be restored to the exercise of his ministry again by the general assembly, yet, regularly, he is not to be settled in the same church; because it is not to be thought his ministry can be useful, in a place where his character had suffered, as, generally speaking, that must be the case, when one is deposed from the ministry for his scandalous behaviour or enormous crimes.

A SUSPENSION of a minister does not bar him from the stipend, or other rents, during its currency, because the statute does not extend to that case; so that it resolves only into a bill of ease, till it is taken off, or expires. By the canon law, suspensions were both *ab officio*

bent; the effect of this of old and at present; for what causes inflicted; the patron's term for presenting only commences from the time of the notification of the sentence to him.

221. Some crimes infer deprivation, *ipso facto*, from the time of committing them.

222. In heresy, place for repentance before sentence.

223. How far deprivation, *ipso facto*, takes place with us.

224. A minister deposed, thereafter reposed, cannot regularly be settled in his former church.

225. Suspension does not exclude from the intermediate fruits.

cio et beneficio^a; which, it were to be wished, took place with us, for then they would be more regarded than generally they are.

^a C. 43. ext. de elect.

226. The minister's relation to the church may be loosed without deposition.

SOMETIMES church-judicatories do not pronounce the sentence of deposition or deprivation, *ab officio*, on ministers accused before them; but only declare their relation to the parish loosed, and that they are no longer ministers of this national church: by this sentence, they are truly deprived from their benefice, and incapable to be admitted to any other charge within this church, till it is taken off. This course is sometimes followed, when ministers are contumaciously disobedient to church-judicatories; or divulge, and obstinately maintain, principles inconsistent with our standards of faith, or the presbyterian scheme of church-government, and are found to merit that, and no higher censure.

227. The effect of affirming or reversing the sentence of deposition, or loosing the relation, in discussing the appeal as to the rents of the benefice.

If the punishment of deprivation, or loosing the relation, is inflicted by an inferior judicatory, and thereafter, upon appeal, the sentence is reversed by the superior court, it is held as if it had not been pronounced; but, if it is affirmed, then it is in the same case as if it had not been appealed against; because the judgment in the appeal is always drawn back to the first sentence, whereof the justice is tried in the appeal: hence, where the sentence is affirmed, the minister's right to the rents of the benefice or stipend ceases from the date of the first sentence; and, if reversed, his right continues, as if no sentence had intervened.

228. Benefices vacant by demission or renunciation of the minister; how this proceeds.

A THIRD manner of churches becoming vacant is, the demission or renunciation of the minister; but as his right to the benefice was conferred by the superior, so it cannot be renounced without the proper superior's consent, and without that the renunciation is void. Hence the pope's licence was necessary to the renunciations of bishops, and that of the bishop to the renunciation of the inferior clergy within his diocese^b. At present, a demission by a minister must be made in the hands of the presbytery, and accepted by them, till which it is void; because his admission and settlement proceeded from them, and they are the only proper judges, if the causes, for which he is disposed to renounce, are sufficient. A purely voluntary demission or renunciation accepted, without assigning any cause, will be effectual, and exclude the renouncer from the benefice^c; but, regularly, such renunciation proceeds upon certain considerations, which determine the superiors to admit of it, and which otherwise they may refuse, as being prejudicial to the interest of religion.

^b C. 4. 10. fin. ext. de renun.

^c C. 5, 6, 7. ibid.

229. The justifiable causes for a demission; it ought to be absolute.

THE causes assigned in the canon law, for licensing or receiving such renunciation are, 1. Consciousness of some heinous crime, whereby the churchman becomes unworthy to exercise the office, and therefore is disposed to retire to a life of penitence. 2. Infirmary of body, or disorder of mind, which quite disables him from officiating. 3. Ignorance, whereby he is incapable to perform the duties of the office. 4. The malicious hatred of the people against him, which renders his ministry useless among them^d. But, unless some of those are in the case, the renunciation was not to be accepted, or at least might have justly been refused. With us, demissions

^d C. 10. ext. de renun.

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demiſſions are never admitted, but upon grave conſiderations; they muſt be offered to the preſbytery, now in the place of the biſhop.

RENUNCIATION, or Demiſſion of an eccleſiaſtical benefice, ought to be Simple and Abſolute; for if it is a demiſſion or reſignation in favour of another, either directly or indirectly, the promotion of that other, in conſequence of it, is void, as ſimoniſtical, tho' the reſignation holds as a demiſſion, and excludes the reſigner from the benefice^a.

^a Conſt.
Pii V. de
confidentiis.

^b P. 1612.
c. 1.

^c Ibid.

^d P. 1690.
c. 5.

^e Cap. pen.
ext. de rer.
permut.

^f Jan. 18.
1676. college
of Aberdeen.

^g Extravag.
execrabilis
Joan 22. de
prebendis.

No ſuch kind of demiſſion is practiſed with us; but, if ſuch paction were made between a patron and a miniſter, that, upon the miniſter's reſigning, he ſhould preſent another particular perſon agreed on, it would ſeem, that it ſhould be a ſufficient objection againſt the preſentee; becauſe a ſimoniſtical paction is a valid reaſon for reſuſing the perſon preſented^b; and as to the crime of ſimony, the canon law ſeems to be our rule, what ſhall come within the compaſs of it. The lords of ſeſſion are impowered to judge upon ſimoniſtical pactions, and the quality of them, when objected to preſentees; and it would ſeem, that, by the ſtatute^c, they had an excluſive jurifdiction, even where ſuch queſtion occurred between the patron, the perſon preſented, and the biſhop; but that act was reſcinded, on re-eſta-bliſhment of preſbyterian church-government^d; and therefore our church-judicatories are at full liberty to cognoſce and determine in ſuch queſtions occurring in the ſettlements of churches, deprivation of miniſters, or in order to other eccleſiaſtical cenſures.

230. What if a paction intervene between the patron and miniſter, that, on his demiſſion, a particular perſon ſhall be preſented; in what courts ſimony cogniſcible.

PERMUTATION of benefices is frequent in the Romiſh church, but is held as ſimoniſtical, if done without the ſuperior's conſent^e. It required likewise the conſent of the reſpective patrons; becauſe, otherwiſe, none of the beneficiaries could be ſure of being preſented to the other's benefice; for both churches became vacant, and behoved to be planted anew, as at the beginning: no ſuch thing is in uſe with us. The tranſportations of miniſters, from one charge to another, are indeed frequent, but that only happens where the place, to which the tranſportation is made, is vacant.

231. Permutation of benefices; it has no place with us.

THIS leads me to the manner of a benefice's becoming void, by tranſportation of the miniſter from it to another, which is a fourth kind of voidance: this takes place where perſons of ſuperior qualities are wanted to ſupply an eminent charge. The city of Edinburgh has the privilege of calling miniſters from any other churches to ſupply their vacancies. In all tranſportations, the greater good of the church, and not of the churchmen, ought to be conſidered. The miniſter hath right to all rents and profits, that fell due before the tranſportation, of the benefice whence he is tranſported, and to all that falls due thereafter of that to which he is tranſported^f.

232. Vacancy by tranſportation of the incumbent.

PLURALITY of benefices having cure, is, by the canon law, a manner whereby a vacancy happens: thus, by a benefited perſon's attaining provision to ſuch ſecond benefice, and peaceable poſſeſſion thereof, the firſt becomes void *ipſo facto*; and if he retain it, he may likewiſe be deprived of the ſecond^g: but it concerns only two incom-

233. Acceptance of two incompatible benefices inferred a vacancy of the firſt; this

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takes no
place at pre-
sent with us.

patible benefices, and they are declared Incompatible where both require residence. By our law, where one was admitted to more benefices having cure, the acceptance of the last was declared a sufficient cause of deprivation from the remanent, by a statute with us in times of episcopacy^a. At present, there is no use for this expedient, to prevent plurality of benefices of cure; because none is ever settled in two parish-churches; and as to other benefices, as the royal chaplainries, &c. they are not incompatible, not requiring residence.

^a P. 1584.
C. 132.

234. Non-re-
sidence, or
neglect of di-
vine service
four Sun-
days, a suffi-
cient cause of
deprivation;
but not if oc-
casioned
thro' the in-
cumbent's
infirmity, or
other just
cause.

IN the same statute, non-residence is declared a sufficient cause of deprivation: this happens where the minister is absent from his church, or neglects divine service thereat, four Sundays in the whole year, without lawful cause or impediment; but this is not strictly inquired into, because it is always presumed, that one would not omit his duty, and business of his charge, without just grounds. One's long course of neglecting the pastoral duties, and obstinacy therein, certainly is, from the nature of the thing, a just ground of deprivation; or, at least, for loosening his relation; and instances of that kind have occurred. It is a necessary consequence, from this cause of deprivation, that tho' one, thro' age or infirmity of body or mind, is not capable to officiate, he cannot be deprived of the benefice; but still may retain it, and the whole fruits and revenues, without being compellable to take an assistant upon his own charges, because that is a lawful impediment: therefore, in such case, the presbytery, within which the church lies, must supply the charge from time to time, during the incumbent's inability.

235. If the
minister, af-
ter demission
or deprivation,
continues
to officiate
bona fide,
payment of
the stipend to
him exoner-
ates the pay-
ers; but he is
liable to re-
store to the
patron.

If the minister continue to preach in the church, the parishoners payment to him, of the rents of the benefice or stipends, for terms falling due after demission or deprivation, will be sustained as *bona fide* made; but, since he has no title to those, for any terms after the sentence or acceptance of the demission, which deprives him of the benefice, he is liable to restore what he so receives to the patron, who is intitled to uplift the vacant stipends, and employ them on pious uses; and, after intimation of the sentence from the pulpit, no payments to the deposed minister will be sustained^b; which must be the case likewise where the demission is intimated in that manner.

^b Jan. 10.
1679. college
of Aberdeen.

Observations on the Law of England, in relation to the Premises.

1. Ecclesia-
stical persons
why called
the clergy;
upon what
title bishops,
abbots and
priors sat in
parliament.

ECCLESIASTICAL persons are called the Clergy, as chosen to be the lot and inheritance of God, separated from the world, that they may spend their time in spiritual exercises and meditations; and the privileges granted to them are said, in the great charter, to be granted to God^a, viz. to his church, for his honour, and for maintenance of his religion and service. The archbishoprics and bishoprics in England were, of the royal foundation, holden of the king *per baroniam*, and many of the abbeyes and priories likewise; and the bishops, and such of the abbots and priors as held of the king *per baroniam*, were called by writ to parliament, and were lords of parliament. Great were sometimes the revenues of the clergy; for they had the third part of the possessions of the realm^b. And, with us, the church-benefices were the one half of the lands of the realm, if

^a Magna
charta, c. 1.

^b Coke 2.
inst. 3.

we

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^aP. 1597.
c. 281.

we may credit the rule of imposing the land-tax, after the reformation, whereof the one half was laid upon the spiritual estate^a.

^tSpelm. gloss.
(abbots)

THOSE abbots and priors, who had seats in parliament in England, were called Abbots Sovereign; because they acknowledged no superior within the realm, being exempted from the jurisdiction of the ordinary, or bishop of the diocese within which they resided; but, on the contrary, had episcopal jurisdiction over their own houses, and within the precincts of the same; as likewise over inferior abbeyes subordinate to them. Tho' they had a title to sit in parliament, yet they did not attend, except when called by the king's writ; whence it happened frequently, that very few of them were present. Thus it is affirmed by a good author, that, in a parliament, in the time of Henry III. there were present 102 abbots and priors, but that in Edward III's time scarcely 30 did attend^b.

2. Abbots and priors sovereign; why so called.

^cCoke 2.
inst. 3. 4.

^dIbid.

CHURCHMEN had of old more and greater privileges than others of the king's subjects, some whereof still remain. I shall mention a few. A *capias* or caption cannot go against them, upon statutes merchant or staple, the tenor of the writ restricting it to laymen. They are not to serve in person in war. They are to be quit and discharged of tolls, customs, &c. for ecclesiastical goods^c. Upon this head the lord Coke observes, That as the overflowing of waters often makes the river lose the channel, so, in times past, ecclesiastical persons, seeking to extend their liberties beyond their bounds, either lost, or enjoyed not that which of right belonged to them^d; for most of their privileges are lost, and the clergy now are liable to all charges imposed by acts of parliament, unless they are particularly excepted. With us, tho' their persons are privileged against outrages, so that whoever lays violent hands upon a minister, incurs escheat of movables, besides punishment, according to the degree of the offence; yet he has no security against execution for debt, to affect either his person or estate.

3. Churchmen, their privileges of old much greater than at present.

^e31 H. VIII.
c. 10.

^fMackenzie's
preced. p. 37.

THE archbishop of Canterbury has the precedency before the lord Chancellor, and all the nobility, next to those of the blood royal; and next to the Chancellor the archbishop of York, &c.^e. With us the lord Chancellor and lord Treasurer had the precedency before the archbishop of St. Andrews, and after him the archbishop of Glasgow^f.

4. The precedency of the archbishops.

^gCoke 1.
inst. 96.

^h2 Kell. abon.
223.

EACH archbishop is the ordinary of the whole province, as to visiting it, and receiving appeals from inferior judges within the same: but the bishop is ordinary, *i. e.* has jurisdiction in his own right, within his diocese, as to an original jurisdiction in causes ecclesiastical^g. The archbishop may be guardian of the spiritualities, by prescription, during the vacancy of a bishopric within his province, tho' otherwise, by the common law, the dean and chapter are intitled to such guardianship: and when an archiepiscopal see is void, the dean and chapter of his see are guardians of the spiritualities^h, *viz.* the spiritual jurisdiction of his province and diocese is committed to them; but the custody of the temporalities of every archbishopric and bishopric

5. The privilege of archbishops and bishops.

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shopric in England, during the vacancy, belongs to the king; as did that of such abbeyes and priories as were of the king's foundation^a.

^a Coke 2. inst. 15.

OUR law, in this respect, was almost the same when episcopacy took place with us; only the dean and chapter of each diocese exercised the spiritual jurisdiction, during the vacancy, as would be the case by the common law in England: and as to the temporalities, they were in the king's hands, as patron, during the vacancy; only, upon a bishop's death, the ann, or an half year's fruits of the benefice, more than he had right to by his incumbency, belonged to his wife, (if he had any) and his nearest of kin equally; and, if he had no wife, wholly to them^b. Bishops were elected with us by the dean and chapter, upon a licence from the king, called *Congé d'elire*^c: and in England, the dean and chapter must elect the person for bishop, whom the king names by his letter sent with the *Congé d'elire*^d.

^b P. 1672.
^c 13.
^c P. 1617.
^c 1.

^d 33 H. VIII.
^c 20.

6. The office of chancellor, vicar-general, and commissary of bishops.

EVERY bishop has his chancellor, or principal official, and his vicar-general, commissioned by him to assist in all matters and causes ecclesiastical. The bishop's commissary is he that is limited to a certain place of the diocese to assist him, and commonly has the authority of a principal official, and vicar-general, within his limits^e. Our bishops had their officials or commissaries, and notwithstanding that episcopacy is abolished, yet the commissary courts are still continued, and the judges therein are named by the king.

^e Lynd. de sequest. (verbo vicar. gen.)

7. The business of dean and chapter, and their possessions.

THE dean and chapter are the bishop's council, without whose consent he can pass away no inheritance, as neither could abbots or priors, before the dissolution of religious houses. The consent of the major part must be adhibited in one place, and at one time, and expressed, by fixing of their seal to the deed^f. The bishop and chapter are but one body, but their possessions, for the most part, are divided: the bishop has his part, the dean his, and each particular prebendary a certain part, in right of his prebend, and the dean and chapter have the residue in common^g. The case was almost the same with us; only the chapter or convent needed not be present together, when they gave their consent; and the churches, called Common Churches, in our law, have been such as the dean and chapter had in common.

^f 33 H. VIII.
^c 27.

^g 2 Roll. ab. 224.

8. Rectories or parsonages; churches; free chapels, and chapels of ease.

ANY ecclesiastical dignity, or spiritual living, is a benefice; but, in a more limited acceptation, benefices are rectories and vicarages. Most rectories or parsonages have cure of souls annexed to them, and some have not, which are called *Sine-cures*, as when rectors have vicars under them. A rector is called a Parson, because he is seized in the right of his church, which, in his person, must sue, or be sued. Parson, in a large sense, includes vicars, prebendaries, &c.^h. A church is a place consecrated for administration of the sacraments, and sepulture; and tho' any one may build a church, the law takes no notice of it, till 'tis consecrated by the bishopⁱ. A rectory is a parish-church, endowed with a house, glebe and tithes. A chapel of ease, is that which is built for the ease of the people, as to prayer and preaching, and is served by a curate. But it may be parochial too,

^h Coke 1. inst. 300. 407.

ⁱ Coke 1. inst. 203.

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too, and have a right to sacraments and burials, and to a distinct minister; subject, in some respects, to the mother-church^a. A free chapel, is that which is provided with a minister, without any charge to the parson or parish, or which is exempt from the ordinary's jurisdiction^b.

^a 2 Roll. abr. 340.

^b 37 H. VIII. c. 4.

^c Littlt. 644, &c.

THE freehold of the church, church-yard and glebe, is in the parson, after induction, and is in Abeyance, during the voidance^c; and the case is the same of a bishop, dean, prebendary, &c.

9. The freehold of the church is in the parson, and during a voidance is in abeyance.

THERE are no parish-churches *sine-cures* with us, nor are chapels of ease, or free chapels accustomed at present, nor have we any consecration of churches; tho', being destinated for the service of religion, severe penalties are imposed upon disturbances and offences therein committed; and a parish-church must either be such by prescription, time out of mind, or erected by a decree of the court of commission, in terms of the statute 1707.

NONE is to be ordained a priest or deacon without a Title, *i.e.* some certain place where he is to exercise his function, affording him a maintenance, lest, thro' poverty, he should be a scandal to religion^d. And with us, none is admitted a presbyter, till he is settled in some parish-church.

^d 2 Roll. abr. 225.

10. None is to be ordained a priest or deacon without a title.

THE settlement of parish-churches in England is thus: the patron must present a priest, or one in orders, within six months of the vacancy, to the bishop of the diocese, to be admitted, instituted, and inducted into the parish-church. The bishop may refuse the presentee, if either the patron labour under disability, by excommunication, or the like; or the person presented is not *idonea persona*, *i.e.* a fit and qualified person, which includes ability in learning, and honesty in conversation, or is otherwise disabled and incapable; but an action may be brought before the temporal judge, upon a *quare impedit*, against the bishop, for refusal of the clerk, and then the bishop must shew the cause of refusal specially; and, if it is for any crimes, the judges shall try it by a jury; but, if the ordinary refuse him for insufficiency in learning, the ordinary is not accountable to any temporal judge^e.

^e Coke 2. inst. 64, &c.

11. The method of settlement of churches: what if the bishop refuse the person presented by the patron.

IF the ordinary finds the clerk qualified, he admits, and institutes him, by a formal instrument in writing; and then issues his mandate to the arch-deacon, to induct him, by delivering to him the ring of the church-door, or the bell-rope to toll the bell, whereby he attains possession, and an action of the case for damages lies against the archdeacon, if he refuses^f. By institution the clerk has the cure of souls, and may take possession of the parsonage-house, glebe and tithes, but cannot lett or sue for them till induction^g. Instalment into bishoprics, or other dignities, prebends, &c. answers to induction in parochial cures.

^f Coke 1. inst. 344. 12 rep. 128. ^g Coke 2. inst. 358.

12. Institution, induction, instalment.

COLLATION, is the bishop's conferring, or giving of a benefice to a clerk, when in his hands by lapse, or whereof he is the original patron, and supplies the place of presentation and institution:

13. Collation of benefices.

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but the bishop's clerk must be inducted, as if it proceeded upon a presentation.

14. Advow-
sons, either
collative, pre-
sentative, or
donative.

WHEREFORE the right of patronage, called an Advowson in the law of England, is either collative, presentative or donative; collative is that advowson which is lodged in the bishop, as above; presentative, where the patron presents or offers his clerk to the bishop of the diocese; and if he present first one, and then another, the bishop may institute which of them he pleases^a.

^a 2 Roll. abr.
354.

15. When
does the six
months,
within which
the patron
must present,
commence.

If the church becomes void by the act of God, as the death of the incumbent, or by creation or cession, or otherwise by the act of the incumbent, the patron, at his peril, is bound to take notice of it, and present within six months after: but if it becomes void by deprivation or resignation of the incumbent, the patron must have notice from the ordinary, and may present within six months after such notice^b. If the bishop refuse the presentee, and the patron thinks his exceptions against him are just, the patron must present another within the six months, otherwise he may bring his *quare impedit* against the bishop, as above.

^b Dr. and stud.
dial. 2. c. 31.

16. What
if a church
becomes liti-
gious, by
presentations
made by two
patrons.

If a church becomes litigious, by presentations from two patrons, within the six months, the bishop may suspend the admitting any of the presentees, and suffer the lapse to incur; but, upon request of either party, patron, or clerk, the bishop must award a *jus patronatus*, i.e. a commission to certain persons to inquire, by a jury, who is the rightful patron; and if he admits the clerk, according to the verdict found, he secures himself against any challenge^c; but such verdict only serves for that settlement, and will not bar the other party from making good his right of patronage before the proper court.

^c 2 Roll. abr.
384.

17. The king
patron para-
mount.

THE king, by his prerogative, is patron Paramount of all the benefices in England, so that he may present by lapse, (as shall be observed hereafter) and has right to present to all the benefices of the advowson of bishops and archbishops, during the vacancy of the see^d.

^d Dr. and stud.
dial. 2. c. 36.

18. In bene-
fices dona-
tive, the
simple dona-
tion suffici-
ent: what if
the patron
delay settling
them.

IN the benefices, which are called Donatives, the king or other patron may, by a simple donation in writing, put a clerk in possession of the same without presentation, institution or induction; for in those there can be no lapse, unless it is specially provided in the foundation: but the bishop may compel the patron, by church-censures, to nominate a clerk. As the king may create donatives, so he may, by his charter, licence any subject to build such church or chapel, to be visited by the founder, and not by the bishop^e.

^e Coke 1.
inst. 344.

19. A lapse
the devoluti-
on of the
right of pre-
senting from
the patron to
the bishop,
from the bi-
shop to the
archbishop,

A LAPSE is a devolution of the right of presenting from the patron to the bishop, from the bishop to the archbishop, from the archbishop to the king. The term in which the title by lapse commences, successively from one to another, is six calendar months, not reckoning the day in which the church becomes void; but, in case of resignation or deprivation, the six months run only from the time of notice given by the ordinary to the patron of the same, as above.

Notice

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Notice is likewise requisite, to give the ordinary a title by lapse; but if a patron presents his clerk, before the bishop has collated, tho' the six months are expired, the bishop cannot take advantage of the lapse. If the bishop does not collate the benefices of his own gift, they lapse after six months to the archbishop. If the archbishop does not collate, within six months, to a benefice of his own gift, it lapses to the king. If the church remains void above six months, by the bishop's fault, there can be no lapse to him^a.

from the
archbishop
to the king.

^a Dr. & stud.
dial. 2. 36.
Coke 1. inst.
135. 344.

^b Coke 1.
inst. 344.
^c Westm. 2.
13 Edw. I.
c. 5.

^d Ibid. et
Coke 6.
Rep. 49.

If one that has no right presents to a church, it is called *Usurpation*; but, if his clerk is admitted, and instituted into it, and has peaceable possession six months after institution, he cannot be removed by the true patron^b; but, before expiration of that period, he may be removed, in consequence of the statute^c; tho', at the common law, he could not. Plenarty by six months, is a good plea against a common person or a subject, but not against the king, till six months after induction; and he may, even after that time, remove the incumbent by due course of law, and then present, for *Nullum tempus occurrit domino regi*^d.

20. Usurpation; what if the clerk, put in by usurpation, has peaceable possession for six months.

^e Westm. 2.

If hanging a *quare impedit*, or during an action against an usurper, lapse incur, the patron, if he lose his presentation, shall recover damages by two years full value of the church; and, if he recover his presentation within the six months, damages shall be given to half a year's value, by the foresaid statute^e. In this case three points are inquirable; 1. If the church is full, and, if so, by whose presentation. 2. The yearly value of the church, to ascertain the damages. 3. If six months passed after the voidance. By a late act, no usurpation shall displace the estate or interest of any patron, or turn it to a right; but he that would have had an interest, if no usurpation had been, may present, and maintain his *quare impedit*, upon the next, or any other avoidance, notwithstanding such usurpation. If co-parcenars, joint-tenants, or tenants in common, be seised in an advowson of any church or vicarage, or other ecclesiastical promotion, and a partition is made between them to present by turns, every one shall be taken, and adjudged to be seised of his separate part of the advowson to present in his turn^f.

21. The true patron recovers damages against the usurper; the usurpation does not displace his estate or interest; co-parcenars present by turns.

^f 7 Annæ
c. 17.

THE presentation to benefices belonging to papists, or such as profess the popish religion, or any trustee for them, is vested in the two universities of Oxford and Cambridge; and the archbishops or bishops, to whom a presentation is brought, are required to examine the presentee, upon oath, whether the person, who made the presentation, is trustee for any other person, and to name such person, that it may be known if he is a papist, and, if he refuse to answer, the presentation is void; and, if the patron refuses to make and subscribe the declaration in William and Mary, his presentation is void, and one of the universities shall present^g.

22. The presentation to benefices belonging to papists, is vested in the universities of Oxford and Cambridge.

^g W. and M.
c. 26.
12 Annæ,
sess. 2. c. 13.

It is contended, by a judicious author, that the nomination of priests, to officiate thro' the diocese, was originally in the bishop, and in none else; and that thereafter he allowed the same to lords of manours, who built and endowed churches with manse and glebe, and that

23. Whether was the nomination of priests, to officiate thro' the diocese,

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originally in the bishop.

that this practice at last became the law of the church^a; and we may add, that it likewise became the law of the state.

^a Gib. code, p. 796.

24. An advowson, either appendant or in gross; it passes with the manour to which it is appendant.

THIS right of advowson, or nominating a clerk to a church, which at first was annexed to the person building or endowing the same, became, by degrees, appendant to the manour in which it was built; but it may be severed from the manour, and then it becomes an advowson in gross. It is a maxim of the common law, that *Jus patronatus transit cum universitate, nisi specialiter excipiat*; The advowson passes with the manour of course, unless it is specially excepted^b.

^b Ibid. p. 297.

25. Who presents to a vicarage.

THE parson, and not the patron of the parsonage, is patron of the vicarage; only, if the vicarage becomes void during the voidance of the parsonage, the patron of the parsonage shall then present to the vicarage; because the vicarage is derived out of the parsonage; and, this being done with consent of the patron, the parson is preferred to him in the presentation; but, where there is no parson, he returns to the exercise of his own right^c.

^c Vin. (presentation) 299, 322.

26. Co-parcenars present by turns, according to seniority.

AMONG co-parcenars, the eldest (if they cannot agree) shall present at the first voidance, and the second next, and so in order; and if any of them suffers a lapse, it shall stand for her turn^d.

^d Ibid. 325.

27. An alien may be presented; what if a layman is presented and settled in the church.

AN alien may be presented to a church, and is intitled to be admitted, tho', otherwise, such cannot enjoy frank-tenements. If a layman is presented, instituted and inducted, he is parson *de facto*, and it is not a meer nullity, but he shall continue to exercise the office till he is lawfully removed^e.

^e Ibid. 331.

28. One must undergo two trials before he is admitted to a benefice.

In the admission of persons to holy orders and charges, there are two examinations or trials; first, before the bishop confers the orders, by imposition of hands, he examines the party's qualifications. Secondly, he is anew tried by the bishop before he is admitted to the benefice^f.

^f Ibid. 345.

29. A parsonage, tho' it hath a perpetual vicarage endowed, yet not deemed a sine-cure, in a question about plurality of benefices.

THERE is a pretty strict act in England against plurality of benefices of cure^g; and, in such case, a parsonage, tho' it hath a perpetual vicarage endowed, and that the parson never officiates; yet it shall be taken to be a benefice with cure within the statute, so as to make a plurality: for, notwithstanding such parsonage is generally called a *Sine-cure*, in respect that the parson does not concern himself with the charge, yet the cure, in strictness of law, is as much in him as in the vicar: and, however, in the law-books, it is said in him to be *habitualiter*; and in the vicar *actualiter*; because rectors of *sine-cures*, by their being long excused from residence, are, in common opinion, discharged from the cure of souls^h.

^g 21 Hen. VIII. c. 13.

^h Gib. code 753. Vin. (presentation) 366.

30. Divers ways whereby the statute against plurality of benefices is evaded.

THERE are divers ways however invented, of avoiding the above-mentioned statute: thus, one that is qualified may, by dispensation from the archbishop, hold a second benefice with cure, or the same may be united to the former benefice during the incumbent's life; and

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and peers and others are privileged to retain a certain number of chaplains, who are qualified to hold more benefices with cure of souls^a.

^a Vin. ibid.
p. 368, &c.

OTHER ways, by which one may gain a title to an ecclesiastical benefice, than presentation, collation or donation, are, 1. Union of one church to another, of which the party was before possessed: it must be made by the assent of the ordinaries of the dioceses where such churches stand, and of the incumbents and patrons of them, in terms of the statutes^b.

31. Union; a method by which the party may gain a title to the benefice united.

^b 37 Hen.
VIII. c. 21.
12 Cha. II.
c. 3.

2. By Appropriation (called likewise Impropriation) one may gain a title to an ecclesiastical benefice: this is the severing an ecclesiastical benefice to some spiritual person or corporation, as to a bishop, dean and chapter, &c. and, of old, it was lawful to appropriate the whole fruits to an abbey or priory, they finding one to serve the cure: but thereafter it was provided, that the vicar should be sufficiently endowed^c: to it the king's licence in chancery, the consent of the ordinary and patron, and of the incumbent of the church, are necessary. To dissolve an appropriation, it is enough to present a clerk to the ordinary, and he to institute and induct him, and then the church returns to its former nature; because the incumbent, who came in by presentation, had the whole state in him^d. The king's patentees, tho laymen, were capable of having the parsonages of dissolved monasteries, &c. appropriated to them^e.

32. Appropriation of benefices; how made and dissolved.

^c 15 Cha. II.
c. 6.

^d Coke 1.
inst. 46.

^e 31 Hen.
VIII. c. 13.

3. By *commendam*, one may enjoy an ecclesiastical benefice: this originally was the holding of a void benefice, till it might be conveniently supplied with a pastor, and so was of the nature of a *depositum*; but now it gives the profits to the commendatary, and is either Temporary for some months or years, or Perpetual for life; and, in virtue of it, one is parson or vicar, without institution or induction^f. Where any spiritual person is made a bishop, all his former benefices, (except donatives) are void; but he may prevent it, by dispensation, granted by the archbishop of Canterbury upon the king's mandate: this is called *Commendam retinere*, and by it the incumbency of such benefices, retained, is continued^g: there is likewise a *Commendam recipere*, viz. a liberty, by such dispensation, to take a second promotion in the bishop's own gift, or in the gift of a patron with his consent^h.

33. How may one enjoy an ecclesiastical benefice by commendam.

^f Lev. 3. 38.

^g Dyer. 228.

^h Hob. 155.

OUR law agrees, in many particulars, with the law of England, as to the right of patronage and exercise of it, but in some respects it differs: for, 1. If the patron suffers the six months to elapse, the right devolves to the presbytery, and the patron cannot thereafter present, even tho' he do it before the presbytery supplies the vacancy. 2. The presbytery is not tied down to make the settlement within six months, but if, on proper application, they delay, the superior church-judicature may be applied to, by way of appeal, in due course; but, in such case, the right of presentation does not belong to the king. 3. The right of presentation to benefices, of which papists are patrons, belongs to the king. 4. As to commends, in a proper sense, we have none such at present, tho' after the reformation there were commendatories of the benefices, which be-

34. Points wherein the law of Scotland differs from that of England, as to the exercise of the right of patronage, and other particulars relating thereto.

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longed to monasteries, and other popish foundations, as I have set forth in the foregoing title. 5. Union or disjunction of churches can only be made by the court of commission of tithes.

35. Tithes ;
how far lay-
men capable
of them, or
of a discharge
of the same.

THE tithes are a considerable part of the profits belonging to benefices: they are described by the English lawiers, "an ecclesiastical inheritance collateral to the state of the land not issuing out of it, but distinct from it." No layman, by the common law, regularly, has capacity to take tithes, but was capable of a discharge of tithes in his own lands; for the parson, patron, and ordinary, might have discharged the party of his tithes, or a land-holder may have given part of his land to the parson, for a discharge of the tithes of the residue, viz. by grant or composition, but he could not gain an immunity from tithes, by prescription; for a layman may prescribe in *modo decimandi*, but not in *non decimando*; because he is only, in particular cases, capable of tithes, and therefore, without some special matter shewed, it shall not be intended he hath any lawful discharge^a.

^a Coke 2.
rep. 43. 11.
rep. 13.

36. Tithes
either predial,
as corns,
&c. personal,
as the profits
of one's
trade; these
cannot be
proved by
the party's
oath; or
mixt, as colts,
calves, &c.

TITHES are either Predial, viz. such as immediately arise from the land, whether by manurance, or of its own nature, as grain of all kinds, hay, wood, fruits, &c. these are due, without deducting the expence of labour, and are payable where they grow. 2. Personal, such as arise from the labour and industry of men (other than day-labourers) being the tenth of their clear gains by trade or profession, after charges deducted; these are paid where they are in use only, and then payable where the party attends divine service. Such tithes may be ascertained by all lawful and reasonable means, other than by the party's corporal oath concerning the true extent of the same^b; and because an oath is not allowed as a mean of proof, such tithe turns not to account. 3. Mixt, viz. those that proceed not from the ground, but from cattle, and other things that receive nourishment immediately from the ground, as colts, calves, pigs, lambs, wool, milk and cheese, eggs, &c. and they are payable where they arise.

^b 2 Edw. VI.
c. 13. Coke
2. inst. 649.

37. They are
either great
or small;
altaragium,
what.

A DIVISION of tithes from their value is, that they are either Great or Small. Great tithes are corn, hay, and wood. Small, are other Predial tithes, as likewise Personal and Mixt. These small tithes, in the endowments of vicars, are comprehended under the word *Altaragium*, as the profits that arise from the altar^d.

^c Coke ibid.

^d 1. Roll.
abr. 643.

38. Tithes
due, of common
right,
to the parson;
but, by
endowment
or prescription,
may belong
to the vicar.

ALL tithes are due, of common right, to the parson or rector of the parish where they arise; but, by endowment or prescription, they may become due to the vicar; and the parson of one parish may prescribe to have tithes separately, and divided in the parish of another. If a parson or vicar let his glebe-lands, and does not grant the tithes thereof, the lessee shall pay tithes of them; and if a parson sells the corn growing upon his glebe, the buyer shall pay to him the tithe of the same^e.

^e Coke 11.
rep. 14.

39. If a parson
sows the
glebe, his
executors

IF a parson sows his glebe, and dies, the executor shall have the corn sown by his testator, but he shall pay tithe to the successor. The tithes, and other profits arising during the vacancy, belong to the

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the successor; extra-parochial tithes belong to the king, which is the case in several forrefts ^a.

^a Coke 2. inst. 647.

WOOD is tithable, because it is of annual growth, tho' it is not of annual payment: it is a predial and great tithe, due of common right, but between parson and vicar it has sometimes been construed a small tithe, and to belong to the vicar; but, if the timber is of 20 years growth, or above, or if it is for other uses, to one's house or ground in the same parish, it is not tithable^b. When it is tithable, it must be set out, while standing, by the tenth acre, pole or perch, and when cut down, by the tenth faggot or billet. Wool is a mixed and small tithe, it is no doubt due when clipt; but it is likewise payable out of the wool of sheep killed and spent in the house, and of rotten sheep which die^c. The manner of payment of tithes, is for the most part governed by the custom of each parish^d.

^b Coke 2. inst. 642.

^c 1 Roll. abr. 649.
^d Deg. parsons council. part 2. c. 13.

It is provided by the statute, That every subject shall, without fraud, yield and pay all predial tithes in kind, "as hath of right been yielded and paid within 40 years before the act, or of right and custom ought to have been yielded and paid." This relates to a rightful custom, *De modo decimandi*; and, if any carries away the tithes, before he has justly divided and set forth the same, or otherwise agreed for them, he shall forfeit treble the value of such tithes so taken away; and it shall be lawful to the ecclesiastical person to view and see the tithes justly set forth, and the same quietly to carry away^e. And, by the same act, it is ordained, That all barren heath, or waste ground, that shall be improved into arable ground or meadow, shall not, till after the term of seven years, pay tithes for corn or hay growing thereon.

^e 2 Ed. VI. c. 13.

It is likewise thereby provided, "That no person shall pay tithes for any lands, which, by the laws of the realm, or any privilege or prescription, are not chargeable with tithes, or that he was discharged of by any composition real." Hence tithes shall not be paid of any thing that is of the substance of the ground, as turf, faggots, iron, lead, &c. nor of cattle that manure the ground^f.

^f Coke 2. inst. 651.

By prescription, the orders of the Cisterrians, Templars and Hospitallers, were exempt from tithes of lands in their own hands, which privilege was granted to them by the council of Lateran, and is continued to the owners of those lands, by prescription, if they have not been in use of payment of tithes: the prescription here understood is, time out of mind of man; which takes place likewise as to the *modus decimandi*, where lands were given in satisfaction of the tithes^g.

^g Coke ibid. 653. 31 H. VIII. c. 13.

COMPOSITION real for the tithes, viz. where a recompence is given to the parson, &c. regulates the payment of the same; and must be, by the parson, patron and ordinary, whether before the time of memory, or within it^h, but does not bind the successor beyond 21 years, or three livesⁱ.

^h Coke ibid. 655.
ⁱ 13 Ed. VI. c. 10.

may reap it; the case of tithes during the vacancy. 40. Wood, how tithable; wool tithable.

41. The payment of tithes, how enforced; barren ground improved, free of tithes for seven years.

42. Lands privileged from tithes; tithes not paid for the substance of the ground, as iron, &c.

43. The orders of the Cisterrians, templars and hospitallers, exempt from tithes by prescription; it takes place likewise as to the *modus decimandi*.

44. How does composition real for the tithes take place.

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45. Suit for subtracting tithes regularly is in the ecclesiastical courts; but in many cases a prohibition granted.

PERSONS regularly ought to be sued in the ecclesiastical courts, for subtracting or withdrawing their tithes, by the foresaid act, in a suit of the nature of a spoliation. But a writ of advowson lies, *De advocacione decimarum*, for the tithe is the profit of the church; and if the tithes are taken away, the advowson is of no effect: or, if the question is touching the lands being discharged of tithes, or concerning the *modus decimandi*, or whether the place, out of which the tithes do arise, be in this or that parish, &c. a prohibition will be granted to bring the cause before the temporal court^a.

^a Deg. part 2. c. 26.

46. Action for small tithes may be before the justices of peace.

SMALL tithes of, or under the yearly value of 40 shillings, from any one person, may be recovered within 20 days after demand, and two years after due, before two justices of peace, who may determine the case in writing, with costs, not exceeding 10 shillings; with liberty of appeal to the quarter-sessions, whose judgment is final, and the cause cannot be removed by a *certiorari*; but, if the defendant insist on a *modus decimandi*, and give security for costs and damages in the courts above, the justices shall not proceed^b.

^b 7 and 8 W. III. c. 6.

47. A *modus decimandi*, how constituted or destroyed.

A *modus decimandi*, above described, arose at first from a real composition, which is lost; so that the party is forced to claim by prescription. It is supposed to have been the full value of the tithe, at the time of the original composition^c. This may be discharged several ways, and the tithes become due in kind; as where the land is converted to other uses, or the thing altered or destroyed, for which the *modus* was paid, or by non-payment of the consideration, or by payment of tithes in kind^d.

^c Coke 13. rep. 152.

^d Danv. abr. (disfmes) 607. 1 Roll. 932.

48. Prescription, *de non decimando*, regularly cannot take place, but spiritual persons may prescribe; laymen capable of a discharge of tithes, due only by custom.

A CUSTOM or prescription, *De non decimando*, or to be discharged absolutely of tithes, and to pay nothing in lieu thereof, regularly cannot take place, but sometimes it does. Thus, the king shall pay no tithes, but his lessee shall pay them, even for the antient demesnes of the crown. Thus likewise spiritual persons, and spiritual corporations, as dean and chapter, may prescribe by the common law, *De non decimando*, because they are capable of tithes, and they are not taken from the church. But it is a general rule, that a layman cannot prescribe, by the common law, *De non decimando*, tho' his lands may be discharged by way of retainer: however, he is capable of a discharge of tithes, by grant from the parson, patron and ordinary, tho' not by prescription; and the inhabitants of a county, Hundred, or any part of it, may prescribe, to be free from tithes of any particular thing, due by custom only, as wool, milk of ewes, &c. so that there be a competent livelihood for the parson besides; for, as such tithes are due by custom only, they may be discharged likewise by custom^e.

^e Coke 2. rep. 44. 2. inst. 645. 1 Roll. abr. 653.

49. Lands that belonged to religious houses, in the same case as to tithes, as before the dissolution.

By act of parliament, the king and all persons, their heirs and assigns, who have, or shall have lands, &c. that belonged to the monastries, and other religious houses, dissolved, shall enjoy them discharged of the payment of tithes, in as large a manner as the abbots, &c. enjoyed the same at the day of the dissolution^f.

^f 31 H. VIII. c. 31.

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ONE may cease to be parson of a church; 1. By death. 2. By cession, *viz.* by taking a second benefice with cure of souls^a. 3. By creation; for when the parson is made a bishop, his benefice regularly is void after his consecration, but he may retain it by dispensation, as above^b. 4. By resignation to the ordinary, but 'tis in his discretion to accept or refuse the resignation^c. 5. By deprivation, either for causes imposed by statute-law, in which case there needs no sentence declaratory in the ecclesiastical court; or for causes by the canon law, as where sentence of deprivation is given in the spiritual court for adultery, drunkenness, dilapidation, &c.^d

^a 21 H. VIII. c. 13.

^b 2 Roll. abr. 352.
^c 2 Cod. 63. 198.

^d Coke 3. inst. 204.

50. One may cease to be parson of a church. 1. By death. 2. By cession. 3. By creation. 4. By resignation; and 5. By deprivation.

ANNATS, or first-fruits, after the incumbent's death, originally payable to the pope, never took place in England, except in archbishoprics and bishoprics, and, as to these, were abolished by statute; for otherwise those of other benefices would likewise have been taken away, if they had obtained, the intent of the act having been to withdraw from the pope all advantage of ecclesiastical benefices in England, as the king had thrown off his supremacy^e: but the very next year, the first-fruits, and tenths of all benefices, were introduced and annexed to the crown^f; and the year for payment of the first-fruits is declared to begin immediately from the avoidance, and the new incumbent is intitled to all the other fruits of the benefice, in time of the vacation^g. Thus the annat, or first-fruits, were quite otherwise applied in England, after the reformation, from what they were with us; and at last, they were given, to supply the livings of the poor clergy, by queen Anne^h.

^e 25 H. VIII. c. 20.

^f 26 H. VIII. c. 3.

^g 26 H. VIII. c. 11.

^h 12 An. sess. 2. c. 12.

51. Annats, or first-fruits, never took place in England, except in bishoprics; those, and the tenths of all benefices, belonged to the king, and were given to the poor clergy.

A CURATE, is he who represents the parson or vicar, and officiates in his stead, he ought to be licensed by the bishop. There are perpetual as well as temporary curates, *viz.* where all the tithes and profits are appropriated, and no vicar endowed. The impropiators are obliged to find curates, and some of them have certain portions of the tithes settled upon them. The bishop may appoint to a curate (of a parson or vicar non-resident) a stipend, not exceeding 50 *l.* yearly, nor less than 20 *l.*

ⁱ 28 H. VIII. c. 11. 12 An. sess. 2. c. 12.

52. Curates, either perpetual or temporary; the bishop may appoint them stipends.

EVERY parson, vicar or curate, has a parish-clerk under him, who was formerly a real clerk, but now is commonly a layman, he is chosen by the minister for the time being, and is assistant in performing divine service. The law looks upon him as an officer for life, and to have a freehold in his place, and not as a servant^k.

^k 1 Vin. 153.

53. A parish-clerk formerly a real clerk, now a layman.

OUR law, in the matter of tithes, differs in many respects from the law of England: for, 1. We have no tithes of wood or hay, the great tithes with us being only of corns. 2. As to the small tithes, which we call vicarage-tithes, they are all other tithes, except these of corns, and much fewer things are subject thereto than in England, and non-payment of them, during the years of prescription, *viz.* for 40 years, liberates from the same. 3. There is no real composition for tithes, that can bind the successor. 4. Payment of tithes, by a *modus decimandi*, is not used with us; nor would it avail, that one, and his authors or ancestors, were accustomed, time out of mind, to pay a consideration for his great tithes, to regulate the payment, in

54. The material points in which the law of Scotland differs from that of England, in tithes, and matters relating thereto.

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time coming ; for the party intitled to the tithes may recur to them, in kind, after inhibition used against the heritor. 5. All persons, liable in payment of tithes, may get the same valued at an yearly rate in money, by an action before the court of commission; and in most places the superplus tithes, over and above the minister's stipends, may be purchased at the statutory price, which cannot exceed nine years purchase, with deduction of the king's annuity, and of the king's ease, if the tithes were in use to be paid by rental bolls. 6. Appropriation, or impropriation of tithes, takes only place with us in lands feued out, with the tithes for a certain feu-duty, payable for stock and tithe, of which I have discoursed largely in the foregoing title, and likewise of the immunity granted to the foresaid three orders. 7. Laymen, at this day, may prescribe a right to their own, or other mens tithes, by infestment in the same, with uninterrupted possession for 40 years. 8. Stipends may be assigned to all ministers out of the tithes, by decrees of modification and locality, on suits for that purpose, at their own instance, where they are not in possession of the parsonages, but only in use of receiving a tithe-rate for the tithes; or at the instance of the patrons, where the incumbents are in possession of the parsonages. And, lastly, Prosecutions for withdrawing of tithes, are never with us before spiritual courts or church-judicatories, but ought regularly to be sued before the temporal judges ordinary, viz. the sheriffs of the respective counties where the parties live, or before the court of session.

T I T. IX.

Tacks or Leases, Rentals, Warning and Removing.

SECTION I. *Tacks or Leases for Years.*

1. Tacks, of their own nature, personal, but made real by statute; how far, in some respects, still considered as personal rights.

TACKS or leases, of their own nature, are only personal, being contracts of location, whereby subjects are let for a term of years, or life, for a tack-duty. This, by the common law, and nature of the thing, infers only a personal obligation upon the respective parties, but cannot affect their singular successors. But, by special statute^a, with us, tacks or leases are made real and effectual against successors in the lands, and so may be considered as a servitude thereon. The statute is expressly in favour of the persons that labour the ground, and therefore a tack of the rents of an estate in tenandry are not within it, being in effect but an assignment to the rents; but tacks of houses for habitation, or of other subjects, tho' not rural tenements or farms, do come under it, and so are effectual against even onerous singular successors, tho' it seems to have been found otherwise in the tack of an house^b. For the statute not only secures those that labour the ground, but likewise *all others* that shall take lands: and Lands, in the general acceptation, include Houses, and therefore the statute extends to tacks of all subjects having relation to lands, as of a salt-pan, coaliary, mine, &c.

^a P. 1449.
c. 18.

^b Fount.
Feb. 5. 1680.
Rac.

2. Tacks not good against the superiors, when the

THIS statute takes no place, when the lands fall in the superior's hands, by ward formerly, and by non-entry; because then they return to the superior, free of the vassal's deeds, during which time, however,

however, they do not run, but are suspended, and vulgarly said to Sleep; but the superior cannot remove the tenant till the Whitsunday next after the fee opens to him ^a.

^a P. 1491.
c. 26.

lands open to them.

TACKS only become real by possession attained thereon; so that if a singular successor is infeft in the lands, before the tacksmen enters to the possession, in virtue of the tack, it will not defend him; and, in competition between tacksmen, he that gets the first possession is preferable; and tacks still remain *personal* in this respect, that a backbond, granted by the tacksmen, will be effectual against his singular successor therein; whereas singular successors, in real rights of lands, are not liable to the personal backbonds, or obligations by their authors; but tacks are only made real as to the singular successors in the lands, but, in all other respects, are still personal rights only ^b.

^b Jan. 1.
1668. Forbes.

3. Possession necessary to make a tack real.

POSSESSION upon a tack is similar to feisin of lands; it perfects the right, and makes it real. Hence, if a tacksmen, having power to assign or sublet the lands, executes such deeds, yet, if any of his creditors adjudge the same from him, before the assignee or sub-tacksmen attains the possession, the adjudger will be preferable ^c; because the adjudication fully divests the tacksmen, before the rights from him were compleated by possession, and the same requisites are necessary to the transmission of rights that are to their constitution.

^c Nov. 16.
1750. Campbell.

4. Possession upon a tack equal to feisin of lands.

WRITING is essential to tacks for more than one year; so that tho' it is verbally agreed for more, and the tenant enters to possess, yet the heritor or he may, at any time thereafter, refile ^d. A written tack requires no certain form; for, if the thing let, the time of the entry, the time of endurance, or issue, and tack-duty, are certain, the tack is good, tho' only by way of minute, to be thereafter extended. If no entry is specially mentioned, it is presumed the next term after the date ^e. A tack without an issue, or limitation of time of endurance, is void as to onerous singular successors in the lands, but will affect the letter and his heirs, as importing an obligation not to remove the tenant or his heirs. The like holds when the lease wants a tack-duty; it is null as to onerous singular successors, but good against the letter and his representatives, and gratuitous singular successors in the lands ^f, and will affect them by the warrandice express or implied.

^d July 5.
1636. Keith.

^e Decem. 4.
1629. Oliphant.

^f July 26.
1631. Creighton.
June 20.
1629. Keith.
July 8.
1673. Montgomery.

5. Writing essential to tacks beyond a year; the requisites of a tack in writing.

If the tack is for an elusory tack-duty, or has an exorbitant termination, as for some thousands of years, which may be longer than the world shall last, the tack is void as to onerous singular successors in the lands; because, in both cases, it deviates from the nature of a tack; and, in the first case, is truly a gratuitous grant of the possession, and in the second it is of the nature of a conveyance of property, which must be accomplished by infeftment; and the statute only secures tacks that have a Mail or rent, which must be real, and not imaginary, and an ish or issue, in a proper sense, at which the heritor may have the free use of his property; these obligations, however, are effectual against the granter and his heirs, tho', by the civil law, they would seem to be simply void ^g, as not coming up to the contract

6. A tack null as to singular successors, if for an elusory tack-duty, or an exorbitant term of endurance.

^g L. 46. ff.
h. t.

of

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of location : but, with us, all obligations, tho' not within any of the regular contracts, are good against the person obliged, and his heirs, or gratuitous assignees, as hath been formerly shown, and farther appears, from the above-quoted decision ^a.

^a July 26.
1631.
Creighton.

7. If the tackfman is allowed to retain the whole duty, the tack void as to singular successors.

TACKS are only real and effectual against singular successors, *the tackfman paying the tack-duty to them*, as the old statute bears ; and therefore provisions in the tack, allowing the tackfman to retain the tack-duty for payment of a sum due to him, or even the expences laid out by him in repairing the subject let ^b, are void as to purchasers or adjudgers ; because, in that case, there is no tack-duty which is essential to all tacks : nor will a clause, making the rent payable to any creditor of the letter, be sustained against his onerous singular successors, those being merely personal, which cannot affect the right of fee.

^b Feb. 5.
1680. Rac.

8. A proviso, making part of the tack-duty payable to a creditor, not good against singular successors.

If there remains still a tack-duty, payable to the heritor, tho' small, it may seem, that the same will support a clause of retention of the remainder, in favour of the tenant, during the definite years of the tack, as hath been more than once found ^c ; which must have proceeded on this ground, that the heritor might have let the lands for that small tack-duty, which would be good against a singular successor ; and where, in the body of the tack, the tenant is allowed to retain the superplus, it may seem equivalent : but a provision in the tack, making part of the tack-duty payable to an extraneous creditor of the letter, could not be supported on that ground, after the letter is divested of the lands : for, as above, that would only be, in effect, an assignment of so much of the rent to the creditor, which could not operate in prejudice of the heritor's singular successor, more than if the whole were payable to such creditor ; and the old statute is only in favour of the tenants, and therefore cannot create a real right to the creditor, to whom part of the rent is made payable in discharge of his debt, and nothing but a real right is good against onerous singular successors in the land.

^c June 15.
1664.
Thomson.
June 27.
1674. Peacock. Decem.
11. 1677.
Oliphant.

9. Is retention of a part of the tack-duty good against singular successors.

THIS retention, even in favour of the tenants, may justly be doubted ; for the master's allowing the tenant to retain part of the rent, is as much personal, as when the whole is retained ; and truly it is, in effect, an assignation of the rent to the tenant, and cannot avail after the granter is denuded, and it would unsecure purchasers, there being no record of tacks ; and tho' they ought to inquire into the circumstances of the lands, and tacks thereof, yet their omission cannot give tacks the force of rights of lands, which can only be by infeftment. Thus the old statute bears, *That the tenants shall pay to the purchaser such like mail as they took the lands for*, which surely must import that they shall pay the whole real rent, without regard to such clause of retention ; for, unless the tenant pay the rent, which, by the tack, he was bound to pay to the heritor, or to retain to himself, by his consent, the purchaser of the lands cannot be said to receive the whole rent stipulated in the tack, which, by the foresaid clause in the old statute, he is plainly intitled to.

THERE

THERE is no doubt, but such provisos would be good against assignees to the rents, or arresters of them; because the tenant, by the clause of retention, has a prior right, which cannot be defeated by the subsequent personal deed of his debtor, and the arrestment can only affect the rents that are due to the heritor: and, for the same reason, if, by the tack, the duty is payable to a third person, he will be preferable to posterior assignees or arresters; because he has the first complete right, for it needs no intimation, being in the body of the tack.

10. Such provisos good against arresters of the rents, or assignees to them.

TACKS are, *stricti juris*, to be strictly interpreted; because one is divesting himself of the power of administration of his own estate, which therefore must be taken in the precise terms he gives it: hence, if the tack is not granted to the tenant and his assignees, or contain express power to assign, no assignation can be granted of it, even tho' it bear to subtenants^a: but, if it is a liferent-tack, it implies a power of assigning, tho' not express, if assignees are not excluded^b; or, if it be for a long term, as divers nineteen years^c; for, in such case, it, in some measure, resembles a property, to which a power of disposal is incident.

11. Tacks *stricti juris*; do not regularly extend to assignees, unless express; the assignation, not authorised by the tack, only void.

^a June 18. 1680. Hume. Jan. 3. 1670. Lord Binnie. ^b July 16. 1670. Duff. Feb. ult. 1637. Hume. ^c Spotsw. (tacks) Ross.

BUT it may be justly doubted, if this holds as to tacks of houses for habitation, since the reasons for denying a power of assigning in rural leases, as farms, do not seem to hold in these; for it is indifferent to the heritor of a house what tenant possesses it, the landlord being bound to uphold it; and accordingly the court of session seem to have found^d.

12. Are tacks of houses assignable.

^d Arg. 7. Jan. 1748. Atchieson. observ. by Falc. N. 426.

WHERE the tack is not to assignees, the assignation is only void, and the right of the tack returns to the cedent: but if the right cannot return to the cedent, the tack itself becomes void: thus, a tack, granted to a single woman, not bearing assignees, becomes void by her marrying; because such marriage is a legal assignation of the benefit of the tack to the husband during the marriage; nor can the wife retain the tack exclusive of the husband; therefore, of necessity, the tack itself must become void, in the same manner as in the common case the assignee's right is null, for the heritor cannot be compelled to admit the husband for tenant, more than any other assignee^e. But if, by the marriage-articles, the tack is reserved to the wife, exclusive of the husband's *jus mariti*, or power of administration, the case would alter, since the reason for the tack's becoming void would then cease.

13. Does a tack, not bearing assignees, fall by a tackswoman's marrying.

^e Craig, lib. 2. dieg. 10. § 6. Jan. 1734. Hume.

AN assignment of a tack assignable does not free the tacksmen of the obligations he lies under by the tack; but the assignee, by his own consent and possession, becomes likewise subject thereto: and therefore it is optional to the heritor either to insist against the original tacksmen, or the assignee, for the rent: but if the first assignee shall transfer the tack to another who enters to the possession, he can be no longer liable for the rent which falls due thereafter; because he was only answerable for the rent, on account of his right and possession, from which therefore he must be free when that ceases, as it fully does by the transmission; whereas the original tacksmen remains

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still bound, in terms of his obligation in the contract or tack ; but if the assignee grants a sub tack, he possesses by the sub tacksmen, and so remains subject to the heritor in the rent ^a, and, while the assignation continues in his person, he is liable to all the prestations incumbent upon the original tacksmen ^b.

^a Nov. 24.
1674. Paton.

^b July 8.
1626. Turnbull.

15. Nor can tacksmen sublet, unless impowered by the tacks.

FOR the same reason that a tack, not bearing to assignees, cannot be assigned, except in the above-mentioned cases, so neither can such tack be sublet, unless it bear to subtenants, or expressly contain a power to sublet, or to output and input tenants ^c; because the heritor is not obliged to admit subtenants into the possession, more than he could assignees ; and, as was just observed, the assignation does not free the original tacksmen from the tack, more than a sublet does ; so that, as to the heritor's interest, there is not a material difference between an assignation and sublet, tho' there is some, as shall afterwards appear.

^c Jan. 3.
1672. lady Binnie.

16. Tacks not assignable may be adjudged ; this limited where assignees are expressly excluded.

NOTWITHSTANDING that tacks are not assignable without an express power, yet they are adjudgable ; so that a judicial assignation will carry them, tho' a voluntary one will not ; for all valuable interests that one has must be affectable for payment of his debts : but if, by the express terms of the tack, assignees are excluded, the court of session found it not adjudgable ^d ; so that the rule, *Expressa nocent, non expressa non nocent*, takes place in this case ; and the additional proviso of the parties greatly strengthens the provision of law. And it would seem, for the same reason, viz. the determinate intention of parties that the tack shall be personal, that such tack should be voided by a voluntary assignation, in the same manner as a rental ; and that it should not descend to heirs, unless they are mentioned, more than in rentals ; which is otherwise in the case of tacks without such clause, as shall be shown hereafter.

^d Decem. 4.
1747. Elliot.

17. Subtacks ; the subtenant liable to the heritor for the rent, except so far as, bona fide, paid to the principal tacksmen.

A SUBTACK is " a tack of the lands contained in the principal tack " let to another, who becomes tenant to the principal tacksmen." It requires the same solemnities that a principal tack does, and therefore is null, if wanting a tack-duty, or not bearing a particular issue, but to endure till a sum is paid : nor will a sub tack be good, unless the principal tack bear a power to sublet, as above ; but, in such case, tho' it will not be sustained as a sub tack, yet it may as an assignation of the tack, if the principal tack was assignable ^e. This seems to import, that tho' a power to assign will imply a power to sublet, as being the less, yet that a power to sublet will not infer a power to assign ; and indeed it was expressly so found ^f ; tho', as above, an assignment does not liberate the principal tacksmen at the hands of the heritor, more than a sublet does. This shews that tacks are strictly to be interpreted, and limited to their precise tenor.

^e July 8.
1673. Montgomery. July 27. 1673. idem.
^f Jan. 3.
1672. lady Binnie.

SUBTACKS may be granted by the principal tacksmen, who has either a power to sublet, or output and input tenants, or where the tack is granted to him, and his assignees or subtenants. The subtenant is only tenant to the principal tacksmen, but not to the heritor ; and therefore, if he make payment *bona fide*, without interpellation from the heritor, of his rent to the tenant, he is free, at the instance

^a L. 73. § fin.
ff. de reg.
juris.

^b L. 24. § 1.
ff. locati.

^c Jan. 31.
1665. Ander-
son.

^d Decem. 11.
1623. Earl
Wigton.

^e Lib. 1. tit. 7.

^f P. 1700.
c. 3.
8P. 1593.
e. 185.

^h P. 1703.
c. 3.

ⁱ Feb. 3.
1708. Mali-
ces.

stance of the heritor; but otherwise, tho' the heritor has not directly any personal action against the subtenant, with whom he did not contract^a, yet the fruits and goods on the ground being hypothecated to the heritor, the subtenant, as intermeddler therewith, is liable for the rent, in the same manner as if they had remained with the principal tacksman; so that, in virtue of the hypothec, the heritor may recover from the subtenant the whole rent due to himself, tho' perhaps the principal tacksman had sublet the lands for a less rent^b. However, the allowing the tenant to sublet, is a tacit liberty to the subtenant to pay the rent to the principal tacksman, who therefore, on payment *bona fide* to him, must be exonerated, and his goods freed of the hypothec *pro tanto*; but, if it remains still unpaid, the heritor has a kind of hypothec or privilege upon it, and is preferable to all the principal tenant's creditors thereon^c. If the sublet is cloathed with possession, no deed of the principal tacksman can prejudice it. In all questions at the subtenant's instance, he must instruct the principal tacksman's right, unless his own is consented to, or acknowledged by the heritor^d.

ALL persons who have the free administration of their estates, or have power from the proprietors, may grant tacks of the same. Tutors or curators can only set tacks during their office, and a year thereafter, as factors appointed by the lords of session, in place of tutors to pupils, may, as was formerly observed^e. I have spoken, in the foregoing title, of the power of churchmen to grant tacks of their benefices; and shall only add, that a tack by a churchman, tho' not cloathed with possession in his lifetime, was real and good against his successors in office; but the case is otherwise in tacks by heritors, in a question with singular successors, because the law having prescribed the requisites to tacks by churchmen, in order to their being effectual against their successors; if these requisites are observed they must affect them; and every beneficed person is a corporation, and therefore the successor must be considered as the same person with the predecessor, as to deeds allowed by law.

ALL persons are capable of receiving tacks that are not prohibited by law. Thus persons suspected of popery, unless they purge themselves, by taking the *formula*, in terms of the statute, cannot enjoy right to lands or tithes, by disposition or tack, but the same are void, and the right returns to the granter^f. Tacks of the common good of borrows ought to be set yearly by public roup^g; but that concerns only the petty customs, or other revenues, whereof the produce is uncertain, and not the letting of lands, which may be by tacks of longer endurance, and that either by roup, or otherwise, as the magistrates and council find expedient for the improvement of policy, and good of the burgh. Butchers or fleshers are prohibited, by statute, to possess for pasture more than one acre of ground, and the tacks for more are void, and the goods thereon forfeited, and the party loses his burgheship^h; but this concerns not lands belonging to them in property, which, as other subjects, they may apply to pasture at their pleasureⁱ. Factors appointed by private persons, or by the court of session, for managing sequestered estates, cannot set tacks for longer than their own time of administration, unless they have express

18. Persons capable to set tacks.

19. Persons capable of receiving tacks: tacks to be set yearly of the common good of borrows, how understood. Butchers not to have in tack above an acre of ground.

express power to set tacks for a definite number of years; and tacks, by persons acting for others, must either be set at the rental of the lands, as the same was at the time of their entry, or by roup, to the highest bidder.

20. Tacks of old, by way of a grant by the heritor.

TACKS were of old, not by way of mutual contract, but only single, and of one part, *viz.* by a set from the heritor to the tenant, whereby all the express obligations lay on the letter, and none but implied ones on the tenant, who did not sign the tack, and might therefore renounce it as a right only in his favour, unless he entered to possess in virtue thereof; for then all the obligations mentioned in the tack, as implied by law, become binding upon him; but now they are, for most part, by way of contract, signed by both parties.

21. The respective obligations lying upon the heritor and tacksmen.

THE obligations lying upon the heritor, or letter of the tack, are, that he shall put the tacksmen in possession of the subject, and maintain him in it to the end of the tack: and in a sett of a house for dwelling, that the same shall be habitable, and kept in that condition by the letter. In country-houses, for the conveniency of a farm, to which they are accessary, the heritor is only bound to put them in repair at the tenant's entry, who must keep them up, and leave them in the same condition at his removal. If there is nothing said in the lease touching the payment of the land-tax, or other public burthens, it is incumbent upon the heritor to relieve the tenant of the same, unless the custom of the country, where the lands ly, determine it otherwise; because the tack-duty is presumed in full of all the master's demands: but, as to the schoolmaster's salary, in such case the statute divides it between the heritor and the tenant^a.

^a P. 1696. c. 26.

THE tacksmen is bound, on the other hand, to enter to possess the ground or houses lett, that the heritor may have security, by the hypothec, upon the fruits and goods, for his rent; he must duly manure the ground, and not alter the form of the possession without the heritor's consent. He must not deteriorate the ground, by labouring meadows, or otherwise committing waste thereon: he has only right to labour the ground, and reap the full benefit of the fruits, but must not dig under ground for coal, stone, minerals, or clay^b. Nor is he at liberty to cut any of the planting; and severe penalties are due to the heritor, *viz.* 10 *l.* for each tree within 10 years, and 20 *l.* for each tree above that age^c. Mismanagement in those particulars will not infer a forfeiture of the tack, but only subject the tacksmen to damage for what is past, and oblige him to find caution against such practices for the future, if the court see cause.

^b Feb. 28. 1623. Randiford. Feb. 15. 1668. Colquhoun.
^c P. 1698. c. 16.

22. The tack-duty; the terms for which the hypothec lies.

THE chief obligation the tacksmen lies under, is to pay the tack-duty covenanted, and the landlord, for his security, has an hypothec for an year's rent upon the crop and goods on the ground, of which I have largely treated elsewhere^d; and shall only add, that the terms for which the hypothec lies are the legal terms of Whitsunday and Martinmas of the same year, in rural farms, whether of corn or grass; because at the Martinmas the crop of corn is reaped, and the grass is either consumed by the cattle, or cut and dried into hay, tho', at the same time, the tenant hath had perhaps only half an

^d B. 1. tit. 17. § 8, &c.

an year's possession, viz. when his entry is at the Whitsunday, which is ordinary in grafs-farms. But in the rent of houses, where the entry commonly is at the Whitsunday, the first term's rent is at the Martinmas next, and the next term for the rent is Whitsunday in the following year, because the rent is payable for the inhabiting, and not for a crop. I have observed elsewhere^a, that this is the rule in questions touching the rent between the heir and executors of the fiar, and between the fiar and executors of the liferenter^b.

^a Sup. tit. 6.
§ 35.
^b Hume (term
legal and
convention-
al) Feb. 1727.
Johnston,
and the o-
ther cases
there.

IF the tenant suffer the rent to remain unpaid for a year, he may be pursued to remove, or to pay the rent in arrear, and find caution for the rents in time coming; and, if there are two years rent due, the heritor may pursue a declarator of irritancy of the tack, *ob non solutum canonem*. But the irritancy may be purged at the bar, unless an express proviso to the contrary is insert in the tack, that it shall be void upon such non-payment, *ipso facto*, or without declarator, in which case a removing may be pursued directly, without a preceeding declarator. The proviso, "That if two terms run into the third unpaid, the tack shall be void," takes place, if two terms are resting, tho' the third is still current^c. For the rule, *Expressa nocent, non expressa non nocent*, takes place, the legal provision may be purged, but the conventional one cannot: and tho' such conventional irritancies, added to the legal irritancy in feu rights, may still be purged before declarator is extracted, notwithstanding any proviso to the contrary; yet that holds, because in feu-rights the irritancy is purely penal: but in tacks, the tack-duty, whereof the tenant, by annulling the tack, becomes free, is presumed adequate to the yearly value of the lands; and therefore, being an onerous contract on both sides, the pactions of parties must be observed. The clause, "If two terms run into the third unpaid," is of doubtful interpretation, and may be thought to import, that the third term should expire; and therefore it ought to be expressed thus, "That, if two terms run on unpaid, the tack shall become void," which would prevent all question about the meaning of the clause.

^c Gilm. decif.
142. Feb. 16.
1665. Hep-
burn. Jan. 1.
1670. Binnie.
Feb. 19.
1729. lady
Barrel.

23. The ef-
fect of the
tackfman's
suffering the
tack-duty to
run in arrear.

SINCE the tack-duty is on account of the fruits, Sterility or Vastation, occasioned by unusual tempests, or inroads of enemies, or the like, will liberate the tenant from the rent in whole or in part, as the case happens; for such accidents can only hurt the heritor who is owner of the ground^d. I have discoursed largely on this matter elsewhere^e.

^d L. S. c. de
loc. conduct.
^e Lib. 1. tit.
20. § 13, &c.

24. Of steri-
lity of the
ground.

BESIDES the natural and implied obligations between heritor and tenant, of which I have spoken, there may be divers others expressly agreed upon, which must accordingly be observed, those being as various as the humours of parties are different. But these provisos are often only personal, binding upon the heritor and his heirs, but not effectual against his onerous singular successors. Thus a clause, allowing the tackfman to retain out of the tack-duty expenses of repairs upon the land or houses, will not operate against purchasers, who will have right to the full rent from their entry^f; and the case is the same of other provisos, touching retention of the rent, or payment of it to creditors of the heritor, as is above mentioned.

25. Divers
provisos in
tacks not
good against
onerous sin-
gular succes-
sors in the
lands.

^f Feb. 5.
1680. Rae.

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26. Tacks, if cloathed with possession, a good title to remove; they found a possessory judgment.

I HAVE already shown, that tacks of lands are real rights by statute, and effectual against singular successors, when possession is thereon attained before their infestments. They are likewise good titles for removing possessors, upon producing a sufficient title or right to the lands in the letter's person, or it may proceed in the name of the letter, and upon his right^a; and, no doubt, after the tacksmen has attained possession of the lands, he may remove all intruders, or persons that had the possession from him, after expiration of their term. Tacks being a title of possession, they will found a possessory judgment to the tacksmen, so that he may continue to possess on his tack, for payment of the tack-duty therein exprest, after seven years peaceable possession, until it be reduced^b.

^a March 12.
1629. Gal-
lowshills.

^b Decem. 1.
1676. Hume.

27. Rent in victual must be delivered, or tendered in due time; what if it is not.

IF the rent is payable in grain or victual, it must be offered in due time, in terms of the tack. If the master refuse it, the same may be consigned at his peril; and if the tenant dispose of it, he is only liable for the fiars, *i. e.* the rates at which such grain is valued at for such year, by public authority; but, if he do not tender it duly, he is answerable for the common prices, or such as the heritor was necessitated to purchase victual at for the use of his family^c.

^c Hareus
(summons)
March 1682.
Barclay.

28. General obligations upon tenants, to services used and wont, discharged, except as to mill-services.

TENANTS were frequently bound in their tacks, either with, or without writing, to services *used and wont*, without expressing any particulars, which was a handle for the heritors to oppress them. This is happily remedied by the late statute, which declares all such customs void; and ordains, that tenants, in time coming, after expiration of the tacks they were then under, shall only be liable to such services as are particularly mentioned in their tacks, or other deeds in writing; with an exception as to mill-services, wherein such general clause is still effectual to compel obedience, according to use and wont^d.

^d 20 Geo. II.

29. How far a service necessary to the heir as to tacks; what the case of tacks set to more persons, on the death of any of them.

TACKS pass to heirs without any service, to the effect that the heir of the tacksmen may continue to possess upon his predecessor's tack^e; but, if he is to assign it, a service is necessary to establish the right in the assignee's person, for otherwise he can only possess during the apparent heir's life^f. A tack being set to two persons, and the longest liver, for a term of years, it divides equally between them, during their joint lives, and accrues solely to the longest liver; and, after decease of both, it goes to their heirs equally^g.

^e June 17.
1671. Boid.

^f Feb. 14.
1623. Rat-
tray. July 9.
1675. Hume.
^g June 10.
1627. Lau-
derdale.

30. A tack, tho' not mentioning heirs, descends to them; or tho' it bear to executors.

THO' a tack mention not heirs, yet I conceive it will go to them; for *Qui providet sibi, providet heredibus suis*, a right covenanted to one, is intended likewise for the benefit of his heirs; and a term certain being purchased by the tenant, he, or his representatives, must enjoy it. And in our law the rule obtains, that rights, of their own nature heritable, go to heirs, tho' not exprest. It is the opinion of some of our great lawyers, that a tack, not mentioning the tacksmen's heirs, cannot go to them, more than it could be assigned, where it does not bear assignees^h; but the disparity between the two cases is obvious; for an heir is, in the judgment of law, *Una et eadem persona cum defuncto*, understood the same person with the ancestor, and consequently the old statute, securing such till the termination of the tacks,

^h Craig, l. 2.
dig. 13. § 7.
Dirl. (verb.
tacks.)

tacks, must be good to defend their heirs; whereas assignees may be extraneous persons, who cannot be introduced upon the proprietor without his consent. Farther, when the tack is not assignable, the party or his heirs may enjoy the whole term; but it were unjust that, by his death before expiration of the term, it should be forfeited. If a tack should be granted to one and his Executors, it would, notwithstanding, go to his heirs, for such provision is against our law; but tho' a tack specially expresses heirs, it will not be assignable, unless it likewise bears assignees^a. Liferent tacks for more lives fall under the liferent-escheat of each tacksmen respectively during his life, but other tacks fall under the single escheat of the tacksmen^b.

^a D. Feb. 14.
1623. Rat-
tray.
^b P. 1617.
c. 15.

If the rent is paid by the tenant before the term of payment contained in the tack, that forehand payment is presumed fraudulent, and will not save him from a second payment to creditors arresters, or others that shall lawfully affect the same. Rents prescribe in five years after the tenant's removal from the lands in rural holdings; but house-mails prescribe in three years after they fall due^c: but still they are recoverable, upon proving, by oath or writing of the tenant, that they are owing.

31. Forehand payment of rents; prescription of them.

^c P. 1579.
c. 83.
P. 1669.
c. 9.

TACKS are either by Original Set, or by Tacit Relocation. Tacit Relocation is a presumed renovation of the lease for the ensuing year, upon the same terms of the preceeding year: it may either follow upon verbal or written tacks; but tho' the written tack be for more years, yet tacit relocation thereafter only binds the parties for one year: it takes place from the tacit consent of the parties, when neither the heritor warns, nor the tenant renounces in due time. If this is not done 40 days before the Whitsunday at which the tack expires, both parties are fixed for the ensuing year, which may be thus continued from year to year, as long as they please^d. A tacksmen of tithes, or feu-duties, has the benefit of tacit relocation as well as tenants of lands^e; for the presumed consent of parties, to the prolongation of the tack for one year more, holds equally in all tacks.

32. Tacit relocation; in what cases implied; taken off by warning or renunciation.

^d Dec. 2.
1628.
Whiteford.
Jan. 30.
1663. Rickart.
July 18. 1671.
earl Hume.
^e Darl. Feb. 1. 1705. creditors of Dumfermling.

TACIT relocation is a prorogation or prolongation of the tack, by an implied consent to the continuance of the possession, upon the same terms, for one year longer; wherefore, tho' the principal tacksmen be warned to remove at the term of expiring of the tack, it is not sufficient to exclude tacit relocation, if the subtenant be not; because his possession is on the foot of the principal tack, which must maintain him after its expiration, in the same manner as it would the principal tacksmen, were he the possessor, and be a prorogation of it; and therefore, in such case, the subtenant would be continued in the possession till the next term, paying the full rent to the heritor that he was liable in to the principal tacksmen: and, for the same reason, the warning of the subtenant in possession takes off tacit relocation, tho' the principal tacksmen is not warned, provided the subtenant, in both cases, was in use of payment of his rent to the heritor^f; for the subtenant being warned to remove, it is a sufficient notification to the tacksmen, that the tack is not to be continued by tacit relocation, and he not being in the natural possession, there is no occasion to remove him. In the first case, indeed, the subtenant cannot plead, "that he is tenant to one who is tacksmen for years still to run,"

33. In the case of a sub-set, how tacit relocation taken off.

^f March 6.
1632. Lauriston.
June 30. 1663.
Rickart.

the

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the tack being expired; but if he is not warned, either by the principal tacksman, from whom he had the possession, or by the heritor, he must of necessity continue in the possession by tacit relocation.

34. Whether is tacit relocation a good title to remove possessors.

As tacit relocation, by the principal tacksman's not being warned, is not sufficient to maintain a subtenant in the possession, who was warned by the heritor, so neither can it be a title in the person of the principal tacksman, to pursue those in the natural possession, in a removing, or mails and duties, except as to those that had the possession from the principal tacksman, who founds on tacit relocation^a; because, after the tack is expired, his right ceases, and they that do not possess from him are not concerned whether he once had a right or not, but they who have their possession from one cannot dispute their author's title.

^a Decem. 12,
1621. Lag.

35. Implied tacit relocation, by taking forehand rent, or an herezeld.

THERE is an implied tacit relocation, by taking payment of the rent before hand, because the tenant must necessarily continue his possession all the years for which he has paid. The receiving of a Herezeld likewise imports tacit relocation in favour of the widow and representatives of the deceased, whose tack was expired, being, in effect, a *Grassum* or gratification to the master for that benefit, and is not due where the deceased had a standing tack, as hath been shewn elsewhere^b.

^b Sup. tit. 3.
§ 172.

36. How warning or removing taken off by subsequent deeds.

THO' the heritor warns, or the tenant renounces duly, yet the warning or renunciation may be taken off by their subsequent deeds inconsistent therewith, which will make the former lease to be continued by tacit relocation: thus, if the heritor take part of the rent for the ensuing year, or the tenant labour part of the ground, from which he ought to have removed, both the one and the other, in the respective cases, will be bound for that year. In a tack of tithes, inhibition takes off tacit relocation, as was formerly observed.

37. Tacks past from by mutual consent, express or implied.

IT has been already shown, that current tacks may be set aside by action against the tenant, to remove or find caution after one year's rent is owing, and by irritancy, thro' non-payment of the rent for two years together, after the example of feu rights. This last requires a declarator, if there is no express clause in the tack for that purpose. But they may likewise be past from by mutual consent express, or implied from the tenant's leaving the ground, and the heritor's taking possession thereof, or putting another in possession. They may lastly be voided by a written renunciation, granted by the tenant, and accepted by the heritor; but a verbal renunciation of a tack in writing, may be refuted from, in the same manner, as a verbal tack, for more years than one.

38. They fall with the author's right, by the rule, *Resoluto jure dantis, resolvitur jus accipientis*.

TACKS set by liferenters, wadsetters, adjudgers, or others who have temporary or redeemable titles, fall, when their author's rights become extinct, by the rule *Resoluto jure dantis, resolvitur jus accipientis*, i. e. the receiver's right must fall with his author's. The old statute^c does not concern the case, where the letter's right to the lands is extinguished, but only where it comes into the person of a singular successor; for it expressly relates to the heritor's selling or alienating the

^c P. 1449.
c. 28.

^a P. 1491.
c. 26.

the lands ; and it had been absurd to support tacks against the effect of the granter's rights being voided ; since, even in that case, heritable rights, proceeding from him, would fall by the above maxim. but the tacksmen has still the benefit of the other statute ^a, whereby the tenants and possessors are secured in the possession till the next Whitsunday after their author's right falls ; as when set by a liferenter or wadsetter, upon payment of their former rent.

^b Edgar, July
7. 1725.
Richard.

If an heritor grant a tack to a tenant already possessed of one, to commence after expiration of the first tack, and thereafter sell the lands, and the disponent is infeft before commencement of the second tack, the question is, if it can defend the tenant against such singular successor. It may seem, that the possession, being only upon the first, and not on the second tack, the purchaser is not concerned with it ; but the court found the second tack good against him, as being in effect but a prorogation of the first tack ^b : but if the second tack varied from the first, to the prejudice of the proprietor, this could not hold ; for then it could not be deemed a prorogation of the first, and would ensnare purchasers. And, with submission, even the first case may still be doubted, since purchasers are bound only to enquire as to the tacks, by virtue whereof the tenants are in the possession, and the old statute only secures such leases, till the issue or termination of the same.

39. The effect of a second tack, to commence, on the determination of the first, against singular successors in the lands.

^c P. 1449.
c. 19.

It was frequent of old, in proper wadsets, and is sometimes used at present, to insert a tack of the lands, or an obligation to grant one for a definite number of years, to commence at the redemption, for payment of a certain rent ; and the old statute ^c provides, that " such tacks shall not be kept or holden, unless they are set for the very mail, or near thereby." It concerns the state of the rent, as at the time of the wadset ; and it is at the arbitrement of the court of session, what diminution of the rent shall be sufficient to nullify the tack. And, since this convention has an usurious aspect, as continuing the creditor's possession after his security is at an end, I conceive, that, if the rent, at the time of redemption, far exceed the rent covenanted, the tack ought to be voided, upon the least diminution of the rent from that which the lands gave at the date of the wadset ; in such case the rule of law, "*Rapienda est occasio quæ præbet benignius responsum*" ^d, i. e. Every opportunity must be laid hold on, to give relief against a rigorous paction, takes place: the presumption will be, that the rent of the land exceeded that covenanted in the wadset, and must burthen the wadsetter, to prove when it was raised ; and if any doubt remains, the other rule directs the judgment, "*In jure obscuro, melius est favere repetitioni quam adventitio lucro*" ^e, viz. That, in an obscure or doubtful case, he that is insisting for his own ought to be favoured, rather than he that is grasping at adventitious gain : the first is the case of an heritor, after redemption, claiming possession of his lands, and the second that of the wadsetter, who is insisting for a beneficial tack, without giving any consideration for it.

40. Tacks to commence, after redemption of the lands, in some cases reprobated.

^d L. 168. pr.
ff. de reg.
juris.

^e L. 41. § 1.
ff. de reg.
juris.

SECTION II. Rentals. Liferent Tacks.

RENTALS are special kinds of tacks : by those the antient possessors, or others, are received as Kindly tenants and Rentallers, for
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41. Rentals presumed for the rentaller's life; set to one

and his heirs, limited to the first heir; cannot be originally granted by administrators, but may be renewed.

the ordinary grassum or consideration at the entry, and the old accustomed rental or tack-duty. A rental must be perfected by writing duly signed and delivered to the tenant, nor will an enrolment of tenants, as rentallers, in the heritor's court-book, be good against his singular successors, tho' it is effectual against him and his heirs. The presumed terms of rentals are, that they shall be effectual during the lives of the receivers^a; but they are frequently otherwise, by paction, or by custom of the barony, which will be observed as the rule; whereby, very often, they only continue during the joint lives of the master and tenant. Rentals cannot be originally granted by any administrator, as tutor or curator; because they are tacks of a singular nature, with divers privileges, and must be set, either by the heritor himself, or those having a special commission from him: but they may be renewed to the heirs of the rentallers by such administrators, that being a matter of ordinary management; for it is incident to rentals to be renewed, but it must be done upon the same terms as formerly accustomed, at least as profitable for the minor.

^a Feb. 5.
1625. laird
of Aiton. ib.
Maxwel.

If they are granted to one and his heirs, they will be effectual to the first heir of the kindly tenant, and tho' they are conceived in favour of heirs to all succeeding generations, they will last no longer than for the heir's life, during which only they are effectual against singular successors^b. But I humbly conceive, that such obligation would bind the granter and his heirs to receive the heirs of the rentallers as kindly tenants in all time coming, without limitation; in the same manner as a tack without an issue, is binding upon the letter and his heirs, tho' not good against the singular successors. It is otherwise, where Heirs are simply expressed; for indeed it is a general rule, that where rights, not descendable of their own nature, to heirs, are provided in their favour, they are limited to the first heir, that so they may exceed, as little as possible, the ordinary course of such rights. The heir, in such case, must pay, at his entry, the ordinary grassum or fine, in order to be received; in other cases, where the rental is not conceived in favour of the heir, the heritor may admit him or not, as he pleases, tho' the heir always claims interest to be received^c.

^b March 13.
1632. Acha-
ny.

42. Become void by the rentaller's alienation of the major part, and the assignee's possession thereon.

If the rentaller alien, by assignation, or sublet the greatest part, or more than the half of his possession, he loses the whole, as was the case in ward-fees; and, for the same reason, viz. because it is presumed he cannot serve his lord creditably thereafter, and is guilty of high ingratitude in presuming to obtrude strangers upon him; nor will a liberty in the rental, to output and input tenants, import a power to assign. The rentaller's putting others in possession, without a deed of alienation in writing, will not infer recognition or forfeiture of his rental; and unless the party, to whom the alienation is made, enter to the natural possession, the forfeiture does not take place. Tho' the rentaller shall obtain a retrocession, he will not be reponed to his right, from which he had fallen by his alienation and possession thereon^d.

^c July 5.
1625. Aiton. June
26. 1627.
Agnew. June
26. 1627.
earl of Gal-
loway. July
2. 1630.
Rowallan.

43. The king's rental-
lers holden

THERE is something very special in the king's kindly tenants; they have a kind of heritable right to them and their heirs, and cannot be

^d Nov. 13.
1622. Row-
an. March
21. 1623.
Wallace.

be removed at the suit of those that come to have the property of the lands, but are secure, on payment of their rents, and a grassum or fine at the entry of each heir, conform to use and wont, or custom. It appears from the statute^a referred to, that formerly the king's rentallers were holden as heritable proprietors; but, by that statute, the king, after the death of the rentaller, may, with advice of the comptroller, feu or let the lands for augmentation of the king's rental. This privilege is not communicated, nor, from the nature of the thing, is communicable to subjects, who come afterwards to be proprietors of the land^b. Those rentallers, or kindly tenants of the king, resemble Copyholders in England; for tho' copyholds are not properly freeholds, yet they are good to the tenant, by the copy of the court-roll, and his heirs, and the descent in them is governed by the same rules, as in other inheritances^c. There are no such kind of estates with us, among subjects, that I know.

^a P. 1587.
c. 69.

^b Nov. 14.
1726. vis-
count of Stor-
mont against
the four
towns of
Lochmaben.
^c Littl. § 81.

as heritable
proprietors.

RENTALS have the like effect, and require the same solemnities as other tacks; only one's being received a kindly tenant, or rental-ler, by an obligatory writing, is sufficient, and the rental will be understood for the rentaller's life; so that they are good, tho' wanting an issue or definite term of endurance; but such rental is null, if it does not mention a precise tack-duty, for then it is not a tack, whereof a rental is a species^d.

44. How far
rentals differ
from other
tacks.

^d July 7.
1625. laird
of Alton.

A RENTAL, among subjects, is truly a liferent-tack, by implication, with some singularities as to forfeiture, upon aliening the right or possession, or major part of it. This arises from the strict obligations lying on the tenant to the master, for receiving him rentaller: and, for this reason, it regularly determines by the death of the rentaller, being presumed granted out of personal favour to him; and, in some parts of the country, it determines by the death of either grant-er or receiver, the bond of friendship being thereby understood to be broken. They are called *Rentallers*, because received at the old rental in the master's books, and which was the nature of feus originally, they being then only for life^e. Most frequently the tenants of churchmen were rentallers, and thereafter became feuars, when churchmen, and others, were allowed to feu out their lands without diminution of the rental.

45. Among
subjects, un-
derstood life-
rent rights;
the heir has
a kindly
claim to be
received at
the old ren-
tal: rental-
lers of
churchmen
frequently
became feu-
ars.

^e Lib. 1. tit.
1. de feud.

OTHER liferent-tacks to strangers, have a contrary privilege to that of these rentals, for they may be assigned, tho' they do not mention assignees; as likewise have those which are for more than one 19 years^f. The reason of such privilege is, that a party, vested with such right, has a kind of freehold in the lands, and may therefore use the same to the best advantage; and it was thought an hardship to confine a man, for life, to the occupation or manurance of the lands. Liferent-tacks of tithes were much accustomed of old, and sometimes were for the lives of two, three, or more heirs, and some 19 years thereafter; and, in such case, the survivance of the heir, without being served, or even entering to the possession, was sufficient to satisfy the terms of the tack^g. In those tacks, by the express terms of the statute^h, no more falls under the liferent-escheat of the party having right to the tack for the time, than his own liferent; and,

46. The case
of other life-
rent-tacks,
besides ren-
tals.

^f Feb. 28.
1637. Hume.
July 16.
1672. Duff.

^g June 17.
1671. Boyd.
July 9.
1675. Hume.
^h P. 1617.
c. 15.

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and, by the same rule, in very long tacks, I should think, that no more can be carried, by analogy from the statute. These liferent tacks have nothing farther special in them; only, it may be remarked, that if such liferenter lett the lands, the subtenants, after his death, cannot be removed, till a regular warning be used by the fiar, before the Whitsunday ensuing the liferenter's death ^a.

^a P. 1491.
c. 26.

SECTION III. *Preliminaries to a Removing. The Action.*

47. On expiration of a tack, necessarily the tenant renounce, or the heritor warn, to prevent tacit relocation. Renunciation by the tenant, its solemnity and effect, either during the tack, or after its expiry.

WHEN tacks or rentals are expired, it is necessary, in order to take off tacit relocation, (as was already hinted) that either the tenant renounce, or the heritor warn him. Renunciation by the tenant must be by a deed in writing duly signed, renouncing and over-giving the land and possession to the heritor, and consenting, that he may enter thereto without hazard of ejection. It must be delivered to the heritor, and an instrument in the hands of a notary taken thereon. This instrument of renunciation is necessary as a solemnity, and of itself instructs the over-giving and delivery of the renunciation. During the currency or term of a tack, an instrument of renunciation, by the tenant, will not prove acceptance of the renunciation by the heritor, since the tack cannot be passed from, but with consent of both; and, for the same reason, the tenant's leaving the possession, during the lease, cannot free him of it: but, if the heritor thereon take up the possession, the tenant cannot, by returning, avail himself of his tack, which, by his departure, he had relinquished ^b.

^b Nov. 28.
1728. Taylor.

48. Renunciation of a tack implied, by taking a new one in different terms, or acquiring an heritable right; but may revive on these being reduced.

THERE is an implied renunciation of a tack unexpired, by taking a posterior lease, innovating the terms of the first, or by acquiring an heritable right to the lands; but these being taken to secure the right and possession to the tenant, if they are reduced, or otherwise become ineffectual, the former tack will revive ^c; it being always understood in such case, that, by accepting of posterior rights, one does not absolutely pass from any of the prior, unless the other more beneficial stand good. A renunciation is necessary to the tenant who designs to remove, even tho' the heritor shall warn him; because, tho' the heritor cannot complain, when his warning is complied with, yet he is possessor of the documents of the warning: but the heritor is safe without warning the tenant who renounces; because he has a subscribed renunciation from the tenant. Renunciation must be made, 40 days before Whitsunday, against those within the kingdom, and 60 days against those out of it; because, in that case, it must be used in virtue of letters of supplement, executed at the market-cross of Edinburgh, pier and shore of Leith; and the instrument must bear, that a renunciation, duly subscribed by the tenant, was left at each of these places.

^c Jan. 23.
1678. D. of Lauderdale.

49. Warning either solemn, or less solemn: solemn warning only necessary against tenants of farms.

AFTER expiration of a tack, if the heritor intends the tenant shall be removed, it is necessary that a previous warning be used against him. Warning, is "notice legally given to the tenant or possessor "to remove from the lands, or other subjects possessed;" it is either solemn, or less solemn. Solemn warning is from rural possessions, and in it the solemnities required by the statute must be observed ^d. The heritor must duly subscribe a precept to his officer, (who is

^d P. 1555.
c. 39.

is any person he pleases to chuse) to warn, in his name, the tenant to remove himself, family and goods, from off the ground, at the term of removal prescribed in the tack; with certification, that, in default thereof, he shall be held a violent possessor. It must be executed 40 days before the term of removal, if that is Whitsunday; but if any other term is the issue or termination of the tack, it must, in rural possessions, be used 40 days before the Whitsunday that preceeds such term; and the executing it 40 days before the term of removal, in that case, will not be sufficient, because the statute expressly mentions Whitsunday.

THE manner of executing a precept of warning is specially set down in the act: it must be served against the tenant himself, either personally, or at his dwelling-house; but, if he lives out of the kingdom, it must proceed upon letters of supplement, on 60 days, as in other such executions. A copy must likewise be affixed to the ground of the land possessed, from which the removal is demanded, and another copy is to be left and affixed at the most patent door of the parish-church where the lands lie, after public intimation and reading thereof at the church-door, upon the congregation's dissolving from forenoon's sermon; or, if there is no sermon, at the ordinary time of its dissolving: all which copies must be subscribed by the officer, and his execution must bear the whole procedure aforesaid, and be duly subscribed by him, and the two witnesses to the executions^a. The act touching warnings bears, that it shall be used against the tenant personally, or at his dwelling-place; and therefore, even tho' he is out of the kingdom, but has a dwelling-house within it, the warning may be served there^b: but, if he has no domicile, then necessity requires, that the warning must be on 60 days, by letters of supplement, at the market-cross of Edinburgh, pier and shore of Leith, as in other executions, against those out of the kingdom, as just said.

50. The manner of warning tenants, of country farms.

^a June 15.
1631. Ramsay. July 23.
1628. Drum-makill.
^b Feb. 20.
1666. Mac-Briar.

IF the tenant has no dwelling-house on the farm, but has one without the landlord's territory, it may be doubted, if he can be warned there: it would seem, that he may be warned on the heritor's precept, wherever he is found, or in whatever place he lives within the kingdom, for which the statute is sufficient authority, in the same manner as it is for executing it at the church-door, where the heritor's jurisdiction extends not. Those solemnities are required in warning from farms and possessions in the country, that tenants may timely provide themselves.

51. May the heritor's precept of warning be served against the tenant, tho' not living on the ground.

LESS solemn warning is, where many of these solemnities are omitted, as in warnings from dwelling-houses within borows, or other dwelling-houses, or possessions that have no relation to country farms. In those within burgh, it is sufficient, that the officer, without any written warrant from a magistrate, but only in virtue of his office, by a verbal order from the heritor, warn the tenant, by chalking the most patent door of the dwelling-house, 40 days before Whitsunday. This Chalking of the door must bear some indication of the tenant's being warned, and the officer's name must be marked, and all the solemnities performed before two witnesses. The officer gives his

52. Less solemn warning from dwelling-houses, or other subjects, than farms; warning by chalking the door.

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execution of Chalking, (as it is called) subscribed by himself and two witnesses^a. This form of warning was at first used only in borows royal, where, by the custom of burgh, several peculiarities, in divers instances, are introduced, different from the common course of law, for expediting of business; as in services by hasp and staple, re-signation and feisin in one instrument, &c. but it was afterwards extended to borows of regality^b; and may, by the same rule, take place in burghs of barony, viz. that such execution, by the common town-officer, shall be sustained, being the custom of the barony, or burgh of regality.

^a June 24.
1708. Barton.

^b July 18.
1634. Hart.

53. Warn-
ings, as to
country
houses, or
possessions
not relating
to farms.

In dwelling-houses in the country, not appendant to farms; or other possessions which have no relation to country farms, as a soap-work, fishery, &c. the warning may be upon the heritor's, or other lessor's precept, 40 days before the term of removal, tho' it be not Whitsunday^c; nor needs it be either executed at the church-door, or on the ground of the lands, but only personally against the tenant, or at his dwelling-house; the many solemnities, in rural possessions, required by statute, being special to them, that thro' rusticity the tenants may not pretend ignorance; and, that others may be apprised, the room is to be lett, and must be 40 days before Whitsunday, which is the ordinary term of taking farms.

^c Nov. 21.
1671. Riddel.

54. The title
in warning;
none neces-
sary, when
the defender
had the pos-
session from
the pursuer;
in case of a
sublet, who
must be
warned.

WARNING, is in order to remove the possessors, that the warner may take possession of the subject; and therefore regularly one ought to have a real right of property or liferent in the subject, before he use warning therefrom; because, from the term at which the party is warned to remove, the warner's right to the possession, and violent profits, commences in case of disobedience, and therefore, the tenant ought to be put in *mala fide*, by the heritor's infeftment. A liferent by the courtesy, or by the terce kened, is by law equivalent to an infeftment. In the case of apparent heirs, their warning is sustained, provided they are infeft, before the summons of removing thereon is called: and, in adjudgers, a charge against the superior being made equivalent, by statute, to an infeftment, is a good title for warning. A warning, used by the predecessor, will accrue to the heir: tutors and curators need not be warned, they not being properly tenants, but they must be cited on the summons of removing^d.

^d July 28.
1637. Had-
dington.
July 12.
1628. Ben-
net.

If the tenant had the tack or possession, tho' from a person not infeft, or even from one having no right to the subject, the letter has good title to warn and remove him, after the issue of the tack; for the tenant cannot controvert the right of his author. A principal tacksmen may, for the same reason, use warning against his subtenants, but otherwise a tacksmen is not intitled to remove possessors; unless his tack is for life, or for more than 19 years, which is deemed in law as equivalent^e; but, if he had attained possession, the case would alter, for then he might remove all intruders. Payment of rent to an heir, or singular successor, will not be equivalent to the tenant's having the lease from them, as above; because the naked apparen-
cy or disposition, without infeftment, gives right to the rent, but not to remove the tenant; and therefore he, by acknowledging their right

^e Feb. 1747.
Gentle.

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right to the rent does not own their title to remove. Warning at the heritor's instance, while the liferenter lives, is void, tho' the liferenter die before the term^a; because he had no right at the time to the possession.

^a July 17.
1632. Ardu-
al. Jan. 30.
1669. Ag-
new.

THE principal tacksmen ought regularly to be warned after expiration of the tack, provided he continued to pay the rent to the heritor; but if the subtenant possessed by tacit relocation, or was in use to pay the rent to the heritor, it is sufficient to warn him as above, the possessor being the proper person to be removed^b.

^b Jan. 30.
1665. Roc-
kart.

IF any of the solemnities hath been omitted in executing the warning, or if its warrant is defective in the necessary formalities of probative writings, or the warner has no sufficient title in his person, according to the above description, the warning is void. If an action of removing is not sued within three years of the term of removal, the warning prescribes: the effect of the warning likewise ceases, by the heritor's acceptance of a part of the rent for the year after the warning, or even by accepting services or presents from the tenant for that year, provided they are due by the tack. The reason is plain; for, when the heritor has acknowledged the tenant's title to possess after the warning, he cannot pretend to remove him upon that warning. It is likewise void, if the warner has only a joint interest, *pro indiviso*, with others who have not warned, and to whom the tenant has not renounced; for, as the warner in that case could not remove him, so the tenant, by complying therewith, would subject himself to the other joint-proprietors in the rent; but it would seem, that any one of them may warn and remove, finding caution to secure the tenant at the hands of the rest, and to make good the rent; but, at the time of the warning, notice ought to be given to the tenant of such intended surety, that he may be in condition timely to prepare for removing.

55. Warning void, thro' want of the due solemnities; prescribes in three years; loses its effect, by the heritor's thereafter receiving part of the rent, or services for the next year.

THE use and design of warning the tenants is, that they may remove at the term; which if they comply with, by voluntarily removing themselves in the terms of the warning, they ought presently to acquaint the heritor therewith, that he may take possession of the lands; and the safest method to do it is under form of instrument, that others intruding into the void possession may not subject the outgoing tenant, into whose vice and place they succeed, in payment of the rent and violent profits. The term of removing is regulated by the tenor of the lease, which varies according to the different customs of the country; for, in some places, the tenant removes from the arable land at Martinmas, and from the grafs and houses at Whitsunday following; and in others, he removes from the houses and grafs at the Whitsunday, and from the arable land at the Martinmas thereafter; so that, when he leaves the houses, the whole crop on the ground is his; and the warning must always be used 40 days before the Whitsunday preceeding the first term of the tenant's removal, whether it be from the arable land, or houses and grafs. In removing from houses within borows, the custom thereof is to be followed, which, in some, allows a certain number of days after the term. If the tenant do not wholly make void the possession, and offer it accordingly

56. Voluntary removing; what incumbent on the tenant, pursuant thereto; the term of removing, regularly Whitsunday, but may be otherwise by paction.

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ingly to the heritor, he is liable for the ensuing year's rent, and violent profits, as if he had remained in the full possession.

57. Legal removing, solemn or summary; summary removing when allowable.

LEGAL Removing, or by due course of law, is either Summary, upon a process of removing, without any precedent warning, or Solemn, where a warning is necessary, and hath been used. The general rule, as to summary removing, is, that it is allowed in all cases, where the possessor has no title of possession, but possesses either violently, clandestinely, or precariously; or, by his tack or other deed, has obliged himself to remove on a simple charge, and put the heritor into the possession. The possessors of lands, that were subject to a liferent, may be summarily removed, if they entered after the liferenter's death who was in the natural possession; but, if they have tacks from the liferenter, they cannot be removed till the next term of Whitsunday after his death, and must be served with a warning, because truly they are tenants^a.

^a Jan. 12.
1662. Kin-
caid. Feb.
16. 1628.
Thomson.

If the heritor has acknowledged those who at first were vicious possessors, by receiving rent from them or otherwise; or if tenants, who had bound themselves to remove, at the end of their tack, without warning, or upon a simple charge of six days, have been suffered to possess after the term of removal, without interpellation, they cannot thereafter be summarily removed; for, in both cases, the possessors come to be in the same circumstances with other tenants, or tacksmen of lands, and possess by tacit relocation, unless they are previously warned. Summary removing is likewise competent against possessors of towers, fortalices, or manour places for the heritor's proper use; but, if the possessors paid rent for these, a warning is requisite. Summary removing takes place also against debtors possessing the lands, adjudged from them, at the adjudger's instance; and against the disponent of lands, at the instance of the disponent, provided the disponent become obliged to enter him at a precise term, in which case a summary charge is likewise competent on the clause of registration, if there is such in the deed.

58. Summary removing must be by order of law.

IN all cases where summary removing, without a previous warning, is granted, it must be done upon a charge on the tack, or an ordinary action of removing, which is the same as in a solemn removing; for one cannot enter to the possession, and eject others thereout at his own hand, tho' they had bound themselves ever so strictly to remove, and declared, that it should be lawful for the other party to throw them out *brevi manu*; because it is only the part of the judges to make effectual that obligation, and none can assume jurisdiction to himself.

59. Solemn removing; the title in it.

SOLEMN removing is that which requires a precedent warning; and it appears, from what is already said of summary removing, in what cases warning is necessary; for where summary removing is not competent, warning must precede, otherwise the removing will not be admitted. The action of removing, whether summary or solemn, is the same in all other respects, and proceeds on a citation of six days; because all removings require dispatch, that the possession may not be long at an uncertainty: it may be pursued, for the same reason,

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son, before the term, in order to decree the tenant or possessor to remove at the term. The simple seisin, without producing its warrant, is a good title, in a removing, against tenants who have no right to the lands. Where the possession flowed from the pursuer, he needs produce no title, unless the defenders have been obliged, by decree, to pay their rents to another; for, in that case, the tenant will be allowed to call, by an incident diligence, such person to whom he pays rent, to produce his rights. And in all cases, where compearance is made for others, who produce an interest in the subject, the preference will go according to the importance of their rights, as in other competitions, and which must be discussed before any procedure in the removing; as is the case likewise where competitions arise in actions of mails and duties.

^a P. 1491.
c. 26.

THE superior formerly, in virtue of the casualty of ward, which required no declarator, might insist in a removing, notwithstanding of current tacks granted by the vassal; but was bound to continue the tenants till the next Whitsunday after the casualty fell ^a. In other casualties, which require declarator before the superior can attain possession, as in non-entry and liferent-escheat, the superior has no title to warn or remove tenants, unless declarator is obtained before the warning. Superiors, having right to a feu-duty, (or to the casualty of marriage formerly) that imports only *debitum fundi*, have no title to remove tenants; because they have no right to the possession, but only to poind or distrain the goods on the ground for these duties. Annualrenters and annuitants are in the same case; for they have only right to yearly duties out of the ground, for which, as *debita fundi*, they may poind the goods on the ground, but have no title to possess, and consequently cannot remove possessors.

60. In what case the superior can remove tenants; creditors in real debts have no right to remove possessors.

^b Jan. 8.
1628. Mac-
kenzie.

THE husband, by his *jus mariti* in his wife's lands, or by the courtesy after her death, and the widow, who is Kenned to her terce, have good title to remove the possessors; because they have right to the absolute possession by those titles: but, before the relict is kenned to her terce, whereby her own share to the lands is ascertained, she has only right, by the terce, to the third of the rent ^b.

61. The husband, by his *jus mariti* or courtesy, and the wife by her terce kenned, may remove.

A RULE may be laid down, That a title for warning is good to found a removing, which is only consequential to the warning; but there is an exception as to apparent heirs, above-related, who may warn before infestment, but must be infest before they insist in a removing: this is admitted, because the possession is continued to certain effects from the predecessor to the heir, and therefore the warning used by the deceased accrues to the heir, and the heir may warn before he is entered; but still an infestment is necessary to carry on the removing, for the predecessor's infestment does not accrue to the heir.

62. A title for warning, "good for a removing.

THE defences against an action of removing are various: they are either Dilatory, cutting off that *instance*; or Peremptory, excluding the pursuer's right. It is the nature of all dilators that they must be instantly verified; but here, even peremptors, not presently instructed, will be rejected, unless the defender find caution for the violent

63. The defences against removing either dilatory or peremptory; unless instantly ve-

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rified ; cau-
tion must be
found for the
violent pro-
fits.

profits, in terms of the statute ^a ; for they are possibly proponed only for delay, and the possessors, in the mean time, might become insolvent. The dilators are either against the pursuer's title, or formality of the precept of warning and its executions, all which appear from what is already said of these requisites ; or they are against the summons and its executions, which shall be treated of in the proper place ^b.

^a P. 1555.
^c 39.

^b B. 4.

64. The tenant, tho' living elsewhere, may be sued before the letter's court.

THO' the tenant do not live on the lands, or within the jurisdiction where they lie, yet the action of removing may proceed against him before the judge ordinary, whose jurisdiction is founded *Ratione rei sitæ*, i. e. on account of the situation of the subject ; and indeed the necessity of the thing requires it ; but the defender must be cited by letters of supplement. The statute 1555 bears, that " removings " shall be sued before the judge ordinary having jurisdiction ;" and, as barons, are such ^c, I conceive the same are competent before them. And since, by the late statute ^d, suits for rents are reserved to all heritors, such action, as incident to the recovery of the rents, must be good before them ; for otherwise their jurisdiction, in that respect, would be much impeded.

^c P. 1469.
^c 26.
^d 20 Geo. II.

65. The exception, that all parties having interest are not called, or that the tenant is in use of paying his rent to others.

THE exception, " That all parties having interest are not called," takes place in many cases, as where the husband possesses in the right of his wife, and either the one or the other is not called ; but if the husband is only omitted, he may be called for his interest by an incident : it is likewise a dilatory objection, " that the defender is in use of " payment of his rent to another, who is not warned or not called, and " from whom the pursuer derives no right." This allegation will not be admitted, unless receipts, or discharges of the rents to such other person be produced ; and then the only consequence is, that the defender will be allowed an incident to call his author to defend him, and likewise for producing his rights for that purpose, and the issue of the defence will depend on the validity and preference of them. If the other compare, the competition will be discuss between them, before the defender can be decreed to remove. This defence will be instantly repelled, if the pursuer shew that the third party's right was reduced at his instance. The defence, " that the defender is tenant to one who has " a tack of the lands, whereof there are terms to run," is of the same nature ; for the defender cannot invert the possession of the party under whom he possesses : but if that party's tack was expired, the pretence of tacit relocation will not defend the subtenant, that being sufficiently taken off by warning him in the possession, as was just observed ; but the principal tacksmen regularly ought to be called in the removing ^e.

^e Jan. 18.
1745. Lock-
art.

66. The defence of a possessory judgment.

THE defence of a possessory judgment is likewise dilatory : it takes place where the defender has been seven years in possession, by virtue of an infestment, or even a tack proceeding from a third party, without interpellation : this will defend him till the end of his tack, unless the pursuer reduce the letter's right, in which case the defender's tack will fall in consequence ^f. The other effects of a possessory judgment are shown elsewhere ^g.

^f Decem. 1.
1676. Hume.
^g Sup. tit. 1.

THE

^a Hope pract.
obser. tit. 13.
§ 34.

^b Jan. 26.
1665. Logan.

^c Jan. 18.
1676. Bin-
ning.

^d L. 206. ff.
de reg. jur.

THE exception, "that the defender possesses, *pro indiviso*, with others who are not warned," is not good, because that cannot obstruct his removing. But, if he is intitled to possess any part of the subject by a current tack, or otherwise, from the pursuer, and possesses the rest, *pro indiviso*, with it, the defence will be good for the whole, according to an eminent lawier^a. And it seems plain, that it is a good defence, "that the pursuer has only a partial interest in the subject, *pro indiviso*, with others who have not warned the defender, or do not concur in the removing;" for, in that case, it is impossible for the defender to remove from the pursuer's interest, and retain that of the joint proprietors, to whom he would be liable for their proportions, by tacit relocation, as was already observed, upon a warning at such person's instance. But, in the case of a house devolving on different persons, as upon the heir, for the two thirds, and on the widow, for her third or terce, the heir, who has the greatest interest, will be preferred to the possession, and may remove the relict, he paying to her a third part of the rent, because the possession of a house is indivisible^b. For the same reason, where it is not the fault of the parties that they do not divide the subject according to their respective proportions, he that has the greatest interest may remove tenants, finding caution to the others for their proportion of the rent, as in the case of coadjudgers, who are not at liberty to divide their debtor's estate, but the whole must be sold in a ranking and sale, for their payment; but a sequestration, in that case, is most ordinary and expedient. Where the pursuer has only a partial interest, and yet is intitled to remove, on finding caution, the tenant, as above, ought to be certified of it in the warning, for, otherwise, he was *in bona fide* not to comply.

67. The exception, that the tenant possesses, *pro indiviso*, with others not warned; or that the pursuer has only a partial interest, *pro indiviso*, with others who have not been warned.

TENANTS, in rural tenements, are bound to keep the houses in as good condition as they find them at their entry, and therefore they will get no allowance for reparations; nor can they defend themselves in the possession, till they are reimbursed, unless the heritor did not put the houses in an habitable condition at their entry; in which case, the heritor must either refund the expence, or find caution to do it, before his removing can proceed. Nor have they any good defence on account of ultroneous meliorations, whereby the lands may be lett at a higher rent; because, having made them without warrant from the heritor, it was for their own conveniency the disbursements were laid out, and they have enjoyed the intermediate profits, in view of which alone they can be presumed to have made them. But where one, having an apparent title of property, improves the ground, before he is interpellated by suit, upon another's preferable right, he may retain the possession till he is reimbursed, so far as the lands will give an higher rent thereby, after his right is reduced^c; for the defender laid out the expences on the subject, when he believed it to be his own, and therefore he ought to be reimbursed, on its being evicted from him; but his bygone intromissions must be imputed in satisfaction of the same, so far as they extend. This is founded on the rule of law and justice, *Nemo debet locupletior fieri cum alterius jactura*^d, None ought to enrich himself by the spoils of another.

68. What incumbent on tenants as to repairs; not intitled to expence of improvements.

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69. An Herezeld, what does it import; by whom due.

IF the heritor has accepted of an Herezeld or Heriot from the widow or children of a tenant deceased, he is bound thereby to continue them in the possession, upon the same terms, for the next year, commencing from the Whitsunday after the deceased's death. A Herezeld signifies a gift to the master, and is the best horse, ox or cow that belonged to the tenant, in the heritor's option^a. It is not due by the representatives of a tenant, who possessed less than the eight part of an oxgate of land, or had a current tack at his death^b, nor by feuars to their superior, unless it is specially covenanted, because they have no occasion for the master's favour. This casualty is almost universally in disuse, and it is not due, even by movable tenants, unless it is the custom of the barony to exact it, the same being a most unfavourable perquisite^c, as was formerly observed^d.

^a Quon. attach. c. 23.

^b Craig, lib. 2. dieg. 9. § fin. quon. attach. d. c. 23.

^c June 23. 1715. Simpson. July 1733. Ferguson. ^d Sup. tit. 3.

70. The defence of a preferable right, when good against removing.

IT is a peremptory defence against a removing, "that the defender has a preferable right to the pursuer's." But this defence will not be received against those from whom the defender had his temporary or redeemable right, because, in respect to those, he cannot invert the title of his possession; and therefore, at the expiration of the tack, or redemption of the lands, he must render the possession, with reservation of his own rights, as accords, *i.e.* with liberty to him to make use of them thereafter, as he shall think proper, against the pursuer, notwithstanding the decree of removing^e. But, as to all third parties, the defence of a preferable right, tho' acquired after the temporary one, is good; for one may lawfully maintain his possession, by all rights in his person, against third parties, from whom he did not derive the possession.

^e Nov. 22. 1677. Stewart. art.

71. How removing proceeds against the representatives of a liferent tackf-man.

A LIFERENT-TACK expires by the death of the tenant; but, if that happens after the Whitsunday, his heir has right to continue till the next Whitsunday, on the same terms, because, the first term being past, the matter is not entire; but, if he die after the Martinmas, before any of the corns are sown, his representatives may be removed on a previous warning, for otherwise tacit relocation would take place. But, in the case of a liferenter of lands, who pays no rent, there are not proper terms for tacit relocation after his or her death; and therefore their representatives, or other intruders, may be summarily removed.

72. Obedience to the warning; what if not full.

IT is self-evident, that obedience to the warning cuts off all occasion for an action of removing; but this compliance must be full, by the tenant's removing himself and family, cottars and subtenants, goods and effects, and offering to the letter the void possession at the term. In houses within burgh, a punctual removing at the term is not necessary; but, if it is done within the time ordinarily allowed by the custom of the burgh, it is sufficient.

73. Succeeding in the vice, what.

IF the tenant has not made void the possession, and offered it in due time to the letter, he will still be decreed in the removing, and be liable in violent profits from the term at which he ought, by the warning, to have removed, reserving action of relief to him against his subtenants, or other intruders who possessed^f; for, tho' those who enter into the void possession are liable, as Succeeding in the vice of

^f Jan. 30. 1624. Greenlaw. July 24. 1678. Inglis. July 21. 1713. Bridge.

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of the tenant that was warned, yet the heritor will not be put to a new action against them, if they intruded by the tenant's fault, in not offering the void possession, but the tenant will be decreed to remove them, and be liable, as above.

THE effect of a decree of removing is, that it may be put to execution by letters of Ejection; whereby the obtainer of the decree may cause the messenger, with his assistants, forcibly throw out the possessors and their families, and make void the ground, and enter him to the possession; and tho' this, in strict law, may be done without a previous charge to remove^a, yet the safest course is to use it, as is ordinarily practised on six days charge.

^a June 16.
1681. lady
Chatto.

74. Execution upon a decree of removing.

ANOTHER effect of it is, that the tenant, who did not obey the warning, is liable in violent profits, from the term of removal; but, if he had probable ground to defend, the profits will be restricted to the ordinary rent. In houses, the violent profits are limited to double the rent; and in land, the utmost that, by the greatest industry, could have been made of the ground, according to the holding and sowing, is claimable. All intruders, and persons succeeding in the vice of the tenant, as well as the tenant himself, are liable conjunctly and severally in the violent profits; because it is a delinquency to occupy another's possession, against, or without his consent^b.

^b June 30.
1675. Stain-
hill. July 16.
1674. Earl
Argyle.

75. Violent profits, who liable thereto.

ACTIONS of ejection and intrusion are competent against those who have entered into the possession of lands or houses, or continue in the same, *Vi aut Clam*, i. e. by violence or clandestinely. The difference between these is, that no title can defend him, who, by violence, entered to land in the lawful possession of another, or continues therein after decree of removing: but, in an intrusion, the party may defend himself on his title, if he has any; for in such case he is no intruder. I have spoken of these among delinquencies^c.

^c B. 1. tit. 10.
§ 8.

76. The difference between actions of ejection and intrusion.

Observations on the Law of England, in relation to the Premises.

LEASES, originally, were personal contracts or agreements only between the parties, and did not transfer any property to the lessee; and this was one reason, why leases for years were considered as chattels, and went to executors; and another reason was, that the purchasers of long leases escaped the wardship, relief, and other burthens that were annexed to the antient tenancies; and, if they had gone to the heir, they might have fallen under these burthens^a.

^a Bac. new
abr. (leases)
297.

1. Reasons, why leases for years considered as chattels, and go to executors and administrators.

ANTIENLY, if the lease was evicted, the lessee had only action of damages against the lessor and his representatives, and leases were under the power of the freeholder to destroy by a recovery; for the person coming in by a recovery was supposed to come in by a title Paramount: but, in the reign of Henry VIII. it was resolved, that the lessee should not only recover damages for the possession lost, but should also recover the possession itself; and the statute^b gives the termor or lessee power to falsify all manner of recoveries against the tenant vested in the fee of the lands; from which time men began to limit long leases^c.

^b 21 H. VIII.
c. 15.

^c Bac. new
abr. (leases)
300.

2. Leases only personal contracts originally; but thereafter made good against purchasers, and those who come in by recovery.

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3. Leases may be not only of lands, but of goods and chattels: the case of a lease of a stock of cattle.

THE subject of leases is not only lands and houses, but likewise goods and chattels; and if one let for years a stock of live cattle, the lessee hath the use and profits of them during the term; but the lessor hath not any reversion in them to grant over to another, till the lessee shall have re-delivered them to him; for the lessor has only a possibility of property, in case they outlive the term, and all the young ones belong absolutely to the lessee, and do not succeed to supply those that die; so that when any of them dies, the possibility of the reverting property, which only was left in the lessor, is at an end by their death^a.

^a Bac. *ibid.* 301.

4. How far writing necessary to leases.

A LEASE, (from *Laiſſer*, to part with) more properly, is "a demise, " or letting of lands to another for term of life or years, or at will, " upon a reserved rent." A lease is either by parol, or word of mouth only, or in writing: but, by statute, all estates, interests of freeholds, or term of years, not put in writing, and signed by the parties, shall have no greater effect than estates at will, except leases not exceeding three years, whereof the rent reserved shall be two thirds of the full value of the thing demised^b.

^b 29 Char. II. c. 3.

5. Leases either for life, for years, or at will. A lease for life requires seisin.

LEASES therefore are either for life, for years, or at will. A lease for life is, when one has lands lett to him for term of his own life, or the life of another, or for the term both of his own life, and the life of another. A lease for one's own life is an higher interest than that for another's life. There must be livery and seisin upon a lease for life; it cannot be made to commence *in futuro*, because it requires seisin, which must be by immediate possession^c. This is after the example of the old feus, which originally were only for life.

^c Littl. 57. et *ibid.* Coke.

6. Divers ways of forfeiting a lease for life.

THE ways of forfeiting such estate are founded on the same original. Thus, if a tenant for life takes upon him to alien in fee, this is a forfeiture, because it is a renunciation, and is contrary to his fidelity; as likewise it is, if he levies a fine, by which the reversioner is divested, this being a more solemn renunciation. Another way of forfeiture, in a court of record, is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other than his lord, or claiming it himself; for, in all these cases, he denies that he holds the feu from the lord: but those acts, by the law of England, must be done in a court of record, to infer a forfeiture^d.

^d Bac. *new abr.* (estates for life) 279, &c.

7. A lease for years; the lessee may enter after the lessor's death.

A LEASE for years is, when one demiseth or letteth lands to another, to have and to hold for a certain number of years. The lessee, by virtue of such lease, may enter into the lands, even tho' the lessor die before his entry, for it requires no livery of seisin; as a lease for life does, which therefore falls, unless seisin is taken during the lessor's life.

8. The certainty required in a lease for years, as to the time of endurance.

As to the certainty of leases for years, with respect to their continuance, duration or ending, it ought to be ascertained, either by the express limitation of the parties, at the time of the lease made, or by reference to some collateral act, otherwise the lease will be void^e. If one makes a lease for years, without saying how many, it shall be a good

^e Bac. (leases) 430.

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a good lease for two years. A lease "for one year, and so from year to year, as long as it shall please the parties," is a lease for two years certain at least, and at most, after three years, it is an estate at will^a. A lessee for years may grant over his term before entry, but he is not in possession till actual entry. Such lease must be of lands or tenements, whereunto the lessor may come to distrain, and not of incorporeal inheritances^b.

^a Ibid. 462.

^b Littl. 58, &c.

A LEASE for years may begin at a time past, present, or to come; but regularly it must have a certain beginning, and must likewise have a certain end; and if one make a lease for three years, and so on from three years to three years, it is a good lease for six years, and no more^c. Every lease for years is a Chattel Real, and not inheritable, but goes to executors, as above; and tho' it should be conceived to the lessee and his heirs, yet it shall go to the executors^d.

^c Coke 1. inst. 45. 6. rep. 35.
^d Coke 1. inst. 46.

A LEASE at will is made either at the will of the lessor, or lessee; but otherwise it will be understood at the will of both^e.

^e Coke 1. inst. 45.

A PERSON seized of lands in fee-simple may let out the same for as long a term as he pleases: however, if he take a wife, and thereafter make a lease for years, and dies, the wife shall be endowed; for she may avoid the lease, but, after her decease, the lease shall be in force again^f; but tenant in tail can only make a lease for his own life, and no longer^g.

^f Coke 3. inst. 46.
^g Ibid. 44.

A BISHOP or dean, &c. may make a lease of his sole possessions, for twenty one years, or three lives, the requisites in the statutes being observed, particularly that the accustomed rent, for 20 years before, be reserved. Parsons and vicars may grant such leases, the same being confirmed by the patron and ordinary^h.

^h 32 Hen. VIII. c. 28.
13 Eliz. c. 10.

IF a lessee for years assigns all his interest to another, yet the lessor may have action of debt against the lessee, not only for the arrears incurred before, but likewise those after the assignment; for the privacy of the contract remains, and the lessee cannot prevent the remedy the lessor has against him upon the contract, but he may likewise sue the assignee for rents that incurred due, after the assignment, in his option. If the lessor once accept rent from the assignee, when he knows of the assignment, he cannot thereafter charge the lessee for rent becoming due after the assignment, for he hath thereby determined his electionⁱ. But if an assignee to a lease assigns over to another, he shall be liable to pay the rent, which incurred due, during his enjoyment of the same, but not for what becomes due thereafter, the assignee being under no express covenant for the rent.

ⁱ Coke 3. rep. 23. Bac. new abr. (debt) 18.

As an assignee to a lease, or to other things assignable, shall be bound by a covenant real, (as to repair the house demised) which runs along with it, so shall he take advantage of such covenant; and therefore, if the lessor covenants to repair, or grants to the lessee estovers, &c. those, as appurtenants, shall go with the lease, into whoever's hands it shall come^k.

^k Bac. ib. 436.

9. It must have a certain beginning, as well as a certain end; it is a chattel.

10. A lease at will.

11. One seized of lands in fee-simple, may lease out the same as long as he pleases; for what term may a tenant in tail, or beneficed person, lease the lands.

12. If a lessee assign his lease, does he remain still liable for the rent incurring due thereafter; how far is the assignee subjected.

13. An assignee to a lease bound by all the covenants real therein, and may take advantage of such.

IF

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14. What if there be a condition in the lease, that, on failure of payment of the rent, the lessor may re-enter.

IF there is a condition expressed in the lease, that, on failure of payment of the rent, it shall be lawful to the lessor to re-enter, then, upon the condition broken, he may re-enter; but if the reversioner grant the reversion to another in fee, the grantee may distrain for the rent behind; because the rent is incident to the reversion, but he cannot enter upon the land, on the condition broken for default of payment ^a.

^a Littl. 347. et ib. Coke.

15. The difference between a lease for life, rendering rent, and such lease for years, upon a condition of re-entry, in case of non-payment at the day.

IF a man leases for life, reserving rent, upon a condition of re-entry, in case of non-payment at the day, and, after the condition is broken by non-payment of the rent, he distrains for the said rent; this act is a confirmation of the lease. But where a lease for years rendering rent is made, and upon condition of non-payment to be void, and the rent is demanded at the day, and not paid, the lease is absolutely void, and cannot be confirmed by acceptance of the rent thereafter ^b; but such lease does not become void by non-payment at the day, without an actual, express and formal demand of the rent upon the land, tho' no person be there present to pay it; because a rent is not properly due till it is demanded: nor will a clause of re-entry, for non-payment of rent, entitle the lessor, unless, in like manner, he first demand the rent ^c.

^b Vin. (confirmations) p. 129.

^c Vin. (rent) p. 523.

16. Tenant for life, or years, has incident to his estate, house-bote, plough-bote, and hay-bote.

EVERY tenant for life, or years, has, incident to his estate, three kinds of estovers of wood, viz. 1. House-bote, for repairs to the house, and firing. 2. Plough-bote, for his plough, or other instruments of husbandry. And, 3. Hay-bote, or Hedge-bote, which is a right to take wood to repair hedges, &c. to secure inclosures: those he may take in the land demised, unless he is restrained by special covenant ^d.

^d Coke 1. inst. 41.

17. How far may such tenant dig for mines, plough the ground, or carry off things from the houses.

A TENANT for life, or years, may continue to dig in a coal-mine that was open, but otherwise he cannot dig for coal, unless the lease was of the coal likewise; and, if he do, he commits waste ^e: nor can he plough grounds that were not ploughed up time out of mind; nor can he take away doors, windows, &c. fixed to the freehold; but if they were fixed by himself, he may take them away, provided he do not thereby endamage the freehold, but leave the same in as good condition as when they were fixed up ^f.

^e Coke 5. rep. 12.

^f Selk. 368.

18. Tenant at will may be put out at pleasure; but if he has sown the ground, he is intitled to reap the crop; the case of a tenant for life or years in that respect.

THE lessor regularly may put out the tenant at will, at what time he pleases; but if such tenant has sown the land, and the landlord puts him out, he shall have the corn, and free access to cut and carry it away: but if such tenant plant trees, they shall go to the landlord, without any recompence ^g. But if a tenant for years sow the ground, and it is not cut down at the termination of the lease, he shall not have the corn, but the landlord shall have it; for it was his folly to have sown it, when he behoved to know that he could not have right to reap it. A tenant for life sowing the ground, his executors shall have the corn, if he die before it is cut down and carried away ^h; because he could not know its termination, viz. the time of his own death.

^g Littl. 68. Coke 1. inst. 55. 4. rep. 116.

^h Coke ibid.

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IT is not material whether any rent is reserved upon a lease for life, years, or at will, except in the case of leases for life or years, made by tenant in tail, husband and wife, of the wife's lands, and ecclesiastical persons^a, and except in leases by parol, not exceeding three years, whereof the rent reserved must be two thirds of the true value^b, as above.

^a 32 Hen. VIII. c. 28.
^b 29 Cha. II. c. 3.

19. Is it material, that, in a lease, rent be reserved to the lessor.

I HAVE discoursed of the several kinds of rents, and distresses for the same^c, which I shall not repeat. As distress is appointed by law, so replevin is a remedy against distress, when wrongfully taken, or detained to the prejudice of the owner. It is a re-deliverance, by the sheriff, of the things distrained, that they may remain with the first possessor, upon security given by him to try the right with the distrainer, and to answer him in due course of law^d. The sheriff, in such case, may act either by virtue of the writ of replevin, by common law, or *ex officio*, upon the party's complaint by precept, or even a verbal mandate to his bailiff to re-deliver the goods: this power is given him by statute^e. In the case of replevin, the party distrained must have a general or special property of the goods at the time of the taking; but, if a question about the property arises, the sheriff cannot proceed till that matter is decided before him by writ^f.

^c Observat. b. 1. tit. 17.
b. 2. tit. 5.

^d Coke 1. inst. 145.

^e 52 Hen. III. c. 21.

^f Coke ibid. Finch 317.

20. Replevin, and the procedure in it.

OUR law differs in many respects from the premises, as appears from the foregoing title: I shall only add, that, since a landlord cannot distrain for his rent but upon a decree; and as to the year's rent, for which he has an hypothec upon the goods on the ground, he must obtain the same to be sequestered, valued, and delivered to him, by the authority of a judge; there is no occasion with us for a remedy similar to that of a replevin, by the law of England.

By the law of England, an action of waste lies against lessees for life or years, in the same manner as against tenants by the courtesy, and in dower, of which, and the consequences thereof, I have already spoken^g.

^g Sup. tit. 6. (liferents).

THE statutes, which prohibit tenants for life or years to commit waste^h, contain an exception ("unless such tenants have special licence, by writing of covenant, that they may do waste"): this commonly is expressed thus in the lease, *That the same shall be without impeachment of waste*; but this cannot be extended or understood to allow the destruction of the thing itself, but only to excuse the tenant as to permissive waste; and so would not give him leave to fell and cut down trees ornamental, or which are a shelter to a dwelling-house, and much less to destroy or demolish the house itselfⁱ.

^h 32 Hen. III. c. 23. 6
Edw. I. c. 1.

ⁱ Vin. (waste) p. 503.

21. Action of waste lies against tenants for life or years.

22. What if the lease is granted with a clause (without impeachment of waste).

THE statute, last referred to, subjects the party, attainted of waste, to a forfeiture of the place wasted, in a lease, or other estate for life, and treble the value of what the waste shall be taxed at; but, in the case of a lease for years, action of waste, after expiration of the lease, can only lie for treble the value, and which is still competent.

23. The penalty of committing waste.

THO' a tenant in tail after possibility of issue extinct, be without impeachment of waste, yet the court of chancery always interposes, to prevent his committing waste by their injunction; because they will

24. Tenant in tail cannot be restrained from committing of

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waste ; but,
after possibi-
lity of issue
extinct, he
may.

never see a man disinherited ; but other tenants in tail may commit waste on houses, or other part of the estate tail ; and no instance can be given, where such tenant was restrained from committing waste by injunction from the court of chancery^a.

^a Vin. ibid.
p. 519, &c.

T I T. X.

Redeemable Rights of Property.

I HAVE already discoursed of absolute rights of property of lands, and of annualrents, servitudes, and other similar burthens affecting the same : those are several kinds of real rights, or resembling them, of which I proposed, in the beginning of this book, to treat. I now come to the last kind of such rights, viz. Pledge. I considered it elsewhere, in respect to moveables^a ; in which view it is generally called a *Pawn* ; and therefore I shall take notice of pledge here, as it concerns heritage impledged for debts, and redeemable upon payment of the same.

^a B. 1. tit. 17.

1. Redeem-
able rights
of property,
conventional
or legal ; re-
deemable
rights that
do not divest
the granter.

REDEEMABLE Rights of the ground are either Conventional, by the deed of the party ; or Legal, by diligence, viz. Adjudications at present, and, of old, Apprisings. The first are either consistent with the right of fee in the granter, or divest him thereof. The second always suppose the fee in the adjudger's person, consistent with the same's being in the debtor, during the legal reversion.

RIGHTS redeemable, that do not denude the granter, are either dispositions for security of sums lent, which ordinarily contain a bond of borrowed money, or obligation for payment of such sums, and a disposition subjoined of the lands for security to the creditor ; or where lands are disposed to a cautioner for securing his relief : in both these cases the granter is not simply divested, but only to a certain effect, and therefore his infeftment is consistent therewith, even tho' the right in security be holden of the granter's superior ; and the security or incumbrance flies off, as soon as the sum is paid, or the cautioner relieved. A disposition, for relief or security of sums contracted, or to be contracted, in questions with third parties, is void as to all sums contracted after the date of the infeftment ; whether the right itself bears that it is for relief or security of sums, or is so qualified by a backbond, does not alter the case ; and such infeftment may be excluded by exception that the sum is paid, or the cautioner relieved, without reduction or declarator^b. A disposition of lands, in warrandice of other lands principally conveyed, does not divest the granter of the warrandice lands, till recourse is had thereto, upon eviction of the principal lands.

^b Feb. 18.
1680. Caith-
ness. P.
1696. c. 5.

2. Rights of
the modern
form, and
improper
wadsets, ge-
nerally do
not divest the
granter.

NOT only the above rights are consistent with the right of property in the granter, but likewise the new invented securities, whereby the debtor grants not only an infeftment of annualrent upon his lands, but also, in the same deed, a disposition of the same, for security of the principal sum, interest and penalty, are such. And, farther, improper wadsets, whereby the wadsetter has access to the possession, and his principal sum is extinguishable by his perception of the rents,
are

• Dirlet. decif.
176.

are of the same nature ; for where the creditor's right may be abated, it must cease when the whole is satisfied, and consequently the debtor needs not be re-invested ^a: but which would not hold where the wadsetter bars himself from the possession, and grants a back-tack to the reverser for payment of his interest ; for then the debtor is denuded, and he is turned to a tacksmen of the lands, till redemption. However, to prevent dispute as to a qualification for electors of members of parliament, such improper wadsetter is not intitled to the privilege, but only a proper wadsetter ; because he is in possession, and his right not thereby extinguishable, and consequently, in all views, he is the only heritor till redemption ; whereas, in the other case, such improper wadsetter is considered only as a creditor, since he restricts himself to his interest, tho', by the form of the deed, the debtor is divested by the wadset, and, if holden of the superior, must be re-invested upon redemption.

^b Decem. 2.
1662. Clark.
July 10.
1666. Canna.
Feb. 1735.
The creditors of Barclay competing.

A DISPOSITION, burthened with the granter's debts, or with sums payable to the granter, or third persons, divests the granter in favour of the dispositive, who is thereby intitled to the right and possession of the lands, and gives not access to the creditors of the granter, or others interested in such reservation, to sue for the mails and duties, or rents, till they adjudge the lands : however, the clause is a real burthen, and the debts are thereby preferable to the dispositive's right, and is effectual against his singular successors therein, if the burthen is special as to the particular debts, and ingrossed in the infestment ^b. Infestments, upon appraisings or adjudications, do not denude the debtor, during the legal reversion, being only diligences for security of the debt, and therefore, upon payment, the debtor's infestment stands good, and they may be taken off by exception.

3. A disposition of lands, burthened with sums, divests the granter.

• 20 Geo. II.

WADSETS, so termed from Wad, *i. e.* a Pledge, frequently divest the granter of the property, and state it in the wadsetter, tho', for most part, the superiority remains with the reverser : they are heritable dispositions of the lands under reversion, either by a clause in the body of the right, or by a writing apart. Wadsets are either Public, holden of the granter's superior, and these fully denude the granter, who has only the reversion, under the foresaid limitation as to improper wadsets ; or Base, holding of the granter himself. In this last case, the casualties fall by the debtor, the reverser, immediate superior of the wadset, to his superior in the lands, and he is bound to relieve the creditor-wadsetter of that damage, since it happens thro' him. But, if the right contain a procuratory of resignation, and the lands hold of the crown, or even, by the late act, of any subject superior ^c, it is the creditor's fault if he did not execute it, by taking a public infestment ; and therefore he has no relief, in case the casualties fall by the debtor.

4. Wadsets ; the peculiarity in them lies in the reversion.

A WADSET consists of two parts, the Disposition, with infestment thereon, and the Reversion. The disposition, where the reversion is not ingrossed, differs nothing from other dispositions which are absolute ; so that all that is considerable in wadsets is the reversion, whether ingrossed in the disposition, or upon a writing apart.

A REVER-

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5. Reversion, conventional or legal; this last takes place in adjudications.

A REVERSION is "a right competent to the debtor, whose lands are "disponed by himself, or adjudged from him by his creditor, to re- "deem the same, upon performance of the conditions agreed to by the "convention of parties, or required by law;" therefore reversions are either Legal or Conventional. A legal reversion, is the liberty or faculty allowed to the debtor to redeem the lands adjudged, within the time limited by law, and is commonly termed the Legal. In apprisings, (in place whereof adjudications have since come) the legal was seven years only, but thereafter it was extended to ten, which now takes place^a. If a minor succeed to the debtor, during the legal, he has liberty to redeem at any time of his perfect age of 25 years complete, to which time the legal is prolonged by statute; and the case is the same, if an adjudication is led against the minor himself.

^a P. 1661.
c. 62.
P. 1672.
c. 19.

6. If the adjudger is in possession within the legal, is an order of redemption necessary.

THE adjudger, in possession, is accountable for the rents during the legal; and, when it devolves on a minor, during his minority^b. In the case of the adjudger's being in possession, a summons of count and reckoning, or declarator of redemption, executed against him within the legal, will perpetuate it, until the count and reckoning is closed; and if there is any overplus owing to the adjudger, the debtor will be allowed to redeem, on payment of the same at the bar, or within such time as shall be limited by the court of session.

^b P. 1621.
c. 6.
P. 1663.
c. 10.

7. If the adjudger is not in possession, an order of redemption must be used against him within the legal, otherwise it expires; in that case, no use for a declarator of expiry of the legal.

BUT if the adjudger is not in possession, such summons of count and reckoning is inept, and will have no effect to save the equity of redemption; and the lapse of the time infers expiration of the legal, and cuts off the reversion. In such case, the only remedy for the debtor is to examine into the validity of the adjudication, *viz.* if it is regularly led; and a small informality will open the legal, and restrict it to a security. Sometimes the creditor, for securing the property, as he imagines, insists, after expiration of the legal, to have the same declared; but a decree of that kind is of no great effect, unless appearance is made in it for the debtor, whereby it may become a decree *in foro*. The lapse of the time declares itself, and a decree in absence, for that purpose, signifies little; for still a declarator of redemption may be insisted in by the debtor, upon proving payment within the legal, or to have the legal opened, upon informalities of the adjudication; but this must be done, by reduction of the declarator of expiration of the legal, on these grounds.

8. Conventional reversion, either ingrossed in the disposition, or by a deed apart: this last must be duly recorded to affect singular successors.

A CONVENTIONAL Reversion, is that whereby the granter of a disposition of lands has right to redeem the same, upon payment of a certain sum, or performing other conditions agreed upon between him and the creditor: it is either by a clause of reversion, contained in the body of the disposition, and seisin thereon, whereby it is said to be incorporated in the infeftment, or is contained in a writing apart, granted by the wadsetter, as was above hinted. This reversion must be duly subscribed, with all the solemnities of writings of importance; and, if the creditor cannot write, it must be subscribed by two notaries for him, before four subscribing witnesses, a reversion being always esteemed a writing of importance^c. Where the reversion is incorporated in the body of the right, it is sufficiently thereby intimated, the seisin containing it being on record; and when the

^c P. 1579.
c. 80.

a P. 1617.
c. 16.

the reversion is upon a writing apart, it must be registred in the proper record of reversions, within 60 days of its date, or of the infestment on the disposition to which it relates; otherwise it is null as to onerous singular successors of the disponent, but effectual, as a personal obligation, against the disponent, and his heirs or gratuitous assigns^a. If, before the singular successor's right, the matter was rendered litigious, by an order of redemption, and process thereon, or any other action, or if inhibition was used on the reversion, the reversion is good against him, tho' not registred; because, in such circumstances, the same is sufficiently made known, and therefore there is no need of notification of it from the register, the intent of which alone is to give notice of the deeds therein recorded.

b Jan. 16.
1679. Lam-
berts.

BONDS for making reversions, backbonds of trust, or other declaration, by the receiver of a disposition, in favour of the granter, or third persons, will have the same effect with formal reversions against singular successors, if they are duly registred as reversions. Thus, an obligation granted by a fiar to a third person, giving right to the obligee to redeem the lands from his heirs, (failing heirs of the granter's body) upon payment of a certain sum to the extraneous heir of the granter, is effectual against posterior deeds of the granter, being recorded in the register of reversions^b.

c P. 1617.
c. 16.

CONVENTIONAL Reversions are either Perpetual, or Temporary: perpetual, where, without limitation of time, the debtor has liberty to redeem the lands; those, if either incorporated or ingrossed in the body of the right, or duly registred, are not excluded by prescription, being excepted in the act concerning prescription of heritable rights, whether positive or negative^c; and, being *res meræ facultatis*, may be exercised at any time. Temporary, when they are limited to a certain time, within which it is only declared lawful to the debtor to redeem; and sometimes the reversion is declared to expire and become void, *ipso facto*, without declarator, in case redemption is not used within the time limited. This covenant is termed *Pactum legis commissoriae in pignore*, which was entirely reprobated in the civil law^d, nor is it favourably received in ours; for, notwithstanding thereof, the debtor may still redeem the lands, after expiration of the term, before declarator, which is always competent, tho' renounced; and, even in an action of declarator of the irritancy's being incurred, it may be purged by payment at the bar, or a short time will be granted to purge the same, before extract of the decree of declarator; but, after the decree is regularly given and extracted, the reversion is cut off, and the lands become irredeemable^e.

d L. ult. cod.
de pact. pig.

e Feb. 1. 1667.
Earl Tullibardine.

f Reg. maj.
lib. 3. c. 5.

By our old law, in case of such temporary reversion, if it was agreed, that the creditor should not account for the rents or fruits, it was deemed usury^f: but that regulation was only the effect of the canon law, that rejected all interest or profit on the loan of money, and is long since antiquated.

9. Conventional reversions, perpetual or temporary; this last requires declarator of irritancy, when adjected to a wadset.

10. The case of a temporary conventional reversion, by our old law.

IN case a temporary reversion is adjected to a proper sale, the agreement of parties must be observed, and the irritancy of the reversion, incurred by expiration of the term of redemption, cannot be
VOL. II. I i purged;

11. If it is adjected to a proper sale, it takes place precisely, and

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no need of a declarator of irritancy of it.

purged; nor needs it any declarator^a. In this case the irritancy is not understood to be penal, and the purchaser must have the terms of his purchase made good, *viz.* that the lands shall be irredeemable, after elapsing of the term. It will not infer a proper sale, that the receiver of the right has no power to charge for, or require his money; for the more beneficial that the right is, he may be the more indifferent about his money; and therefore, it will depend upon the nature of the right, and equivalency of the onerous cause, whether it is to be considered as a wadset or sale. I have spoken of this *Pactum legis commissoriae* farther elsewhere^b.

^a Jan. 17.
1679. Beatson. July 28.
1709. Stewart.

^b B. I. tit. 17.
§ 5, 6.

12. What if, in adjudications, the legal is opened.

THE legal reversion in adjudications is temporary of its own nature, being limited to 10 years; but, if the legal is opened by informality in the diligence, or by deed of the adjudger, in admitting the same only to subsist for a security, the reversion becomes perpetual; so that payment at any time, either out of the subject adjudged, or other effects, will evacuate it.

13. A parallel between a declarator of expiration of the legal of adjudications, and that of the irritancy of a temporary conventional reversion. Redemption denied, if not used within 40 years after the term.

A DECLARATOR of expiration of the legal, resembles a declarator of irritancy of a conventional temporary reversion, but is not so necessary; because, without such action, the legal expires: whereas a temporary reversion is still open till the irritancy is declared, as is already observed. But, if the debtor delay to redeem, for 40 years after expiration of the term, he will be foreclosed, and no equity of redemption allowed, which he ought to have claimed before prescription was run; for, tho' a perpetual reversion is saved from such prescription, yet a temporary one is cut off, in strict law, by lapse of the term; and the party is only indulged, in equity, still to redeem, by suing an action for that purpose, which indulgence ought to be resorted to, within the time limited to the prescription of other rights and actions.

14. Conventional reversions strictly interpreted; sometimes personal to the reverser; how become these descendible to heirs, or assignable.

CONVENTIONAL reversions, being a burthen upon the right, are said to be *stricti juris*, and ought to be strictly observed, and so not to be extended beyond what is express. They cannot be assigned, nor do devolve upon heirs, if it appear they were intended to be *personal*. This happens either when heirs and assignees are expressly secluded, or when power is given to the reverser "only to redeem at any time during his life;" but otherwise, when reversions are granted to one simply, without mention of *heirs* or *assignees*, it will be understood only to have been an omission of the writer^c, and however they are implied; and therefore that omission cannot limit the right, for *inest de jure*, that one may assign or transmit a right which is not personally conceived; *Qui providet sibi, providet heredibus suis*, He that acquires to himself, is understood to intend his *heirs* likewise; and one may always convey a right that is not merely personal.

^c Jan. 9.
1662. Earl Murray.

WHERE the reversion is personal, the benefit of it may be assigned, or will descend to heirs, after an order of redemption is used; for it is thereby exercised, and the supervening declarator only declares the lands to have been redeemed by using the order. A personal reversion may be carried by adjudication, which is a legal assignation; because no right, except what is purely alimentary, can be exclusive of

of creditors. And it may seem, that personal reversions will likewise fall under the forfeiture of the reverser, for that a personal reversion is a right in the reverser's person, and therefore carried by his attainder for treason. I shall have occasion hereafter to discourse largely upon this point^a.

^a B. 3. tit. 3.

It is also strictly interpreted, in this respect, that the terms of the reversion must be precisely observed, in using the order of redemption, otherwise the order will not be sustained, and the defender will be absolved from the declarator of redemption thereon: however, a proviso, "that the wadset shall be redeemed by the reverser's proper money, not borrowed," is rejected as unreasonable^b, as I have observed elsewhere^c. If the order is used more conveniently for the creditor, it will be sustained, tho' not in the precise terms of the reversion^d.

^b Fount. July 16. 1696. lord Bargeny.
^c B. 1. tit. 17. § 6.
^d July 12. 1634. lord Balmerino. Dec. 11. 1638. Finlayson. Feb. 1. 1667. Murray.

15. The terms of reversion must be strictly observed, in using the order of redemption.

THERE is sometimes subjoined to reversions a clause, "That it shall not be lawful to redeem, but by payment not only of the special sum given upon wadset, but also of all other sums that shall be due by the reverser, his heirs and successors, to the wadsetter and his forefairs." This clause is certainly good against the reverser and his heirs; but, as to his onerous singular successors, it can only extend to such sums as are contracted before the date of the infestment upon the wadset, according to the purview of the statute concerning dispositions, or other rights for relief or security of debts to be contracted^e. But, if the burthen is altogether general, it would not be good against the reverser's onerous singular successor: for example, if the clause is, "That it shall not be lawful to redeem, till all the debts of the reverser, due to whatever person, are paid," an onerous assignee to the reversion would be intitled to redeem, on payment of the sum contained specially in the reversion, and other sums due to the wadsetter before his infestment, without regard to subsequent contractings, or extraneous debts due to strangers, that fell under the general clause^f; for the foresaid statute does only concern debts to be contracted by the disponent to the disponent himself; and therefore such general clause in a reversion cannot be good to secure any other debts, more than in the common case of general burthens.

^e P. 1696. c. 5.

^f Arg. Dec. 1734. ranking of the creditors of Barclay.

16. The effect of a clause in a reversion, that it shall not be lawful to redeem, till payment of all sums that shall become due to the wadsetter.

WADSETS are either Proper or Improper. A Proper Wadset is, "where the wadsetter gets possession of the lands conveyed, and is not accountable for the rents, but retains them for payment of his interest, and takes his hazard of them in all events." The creditor has here only a claim upon the debtor for the principal sum, and, upon payment of it, the lands are declared redeemable; so that tho' the creditor should not get the half of his interest, by the lands lying waste, poverty of tenants, or otherwise, he cannot demand any more than the principal sum; nor, on the other hand, will the overplus rent be imputed in satisfaction thereof, tho' it should far exceed the interest of his money. It will not alter the nature of a proper wadset, that the reverser becomes bound to relieve the wadsetter of the public burthens, feu-duties, or ministers stipends; for still the wadsetter, notwithstanding such paction, undergoes the hazard of the rents^g.

^g July 6. 1630. Nisbet. Dirlet. decis. 268. idem. decis. 436. Newt. decis. 114.

17. Wadsets either proper or improper; proper wadsets, an alienation of the property under reversion.

OLD

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18. The case of proper wadsets granted before the act 1661.

OLD proper wadsets, granted before the statute *anno* 1661, being granted at exorbitant advantage, when the rate of interest was high, and the loan of money hard to be got, through the troubles of the times, it is provided, by the said statute^a, "that the reverser, or those in his right, may offer to the wadsetter security for payment of his interest, during the not redemption or not requisition." In this case, the wadsetter must either quit the possession to the debtor; or, if he chuse to retain it, he is thereafter accountable for the rents, and the overplus, more than his interest, will be ascribed in satisfaction of the principal sum, so that, by this offer, the wadset becomes improper from that time; but if the wadsetter be in the natural possession, and accept the security offered, he must be regularly warned, and otherwise is not accountable for his possession^b.

^a P. 1661. c. 62. Feb. 21. 1666. lord Borthwick. June 19. 1669. Scot. Feb. 10. 1710. Earl of Leven.

^b Feb. 20. 1679. Bruce. Dec. 21. 1710. Earl of Leven.

19. Proper wadsets, subjecting the debtor to the hazard of the rents, unlawful and usurious.

By the same act, proper wadsets, with clauses "that the wadsetter shall not be liable to the hazard of the fruits, poverty of tenants, war, or troubles," granted since the year 1649, are restricted to the current interest, and the overplus rent is deemed imputable to the principal sum; and those of such kind, that should be granted thereafter, are declared unlawful and usurious, and the contracters punishable as usurers. Therefore, tho', in the ordinary case, a proper wadset is that which, by the reversion, is redeemable, upon payment of the principal sum only, there may be other clauses in it which may invert it from a proper to an improper wadset, when the reverser is made subject to the hazard of the rents, or the wadsetter made secure of his interest.

20. Wadsets improper, where the wadsetter is accountable for the rents; or the reverser liable to make good the interest; or the heritor remains in possession under a back-tack.

IMPROPER Wadsets are those "whereby the wadsetter is liable to account for the rents, and must impute the overplus, more than pays his interest, towards satisfaction of the principal sum." They are termed Improper, because it is of the nature of a wadset that the rents should go for the interest, and that it should not be redeemed but upon repayment of the principal sum, whereas here an improper wadset is extinguishable by possession. It is an improper wadset from the very terms of the reversion, if it is declared redeemable, "upon payment of the principal sum and resting interest;" because, in that case, the creditor hath not the rents for his interest, but has the debtor bound for it. Farther, if the debtor stands obliged to uphold the rents, or if the wadsetter is declared accountable for them, it is evidently an improper wadset. Or if the wadsetter enters not into possession, but grants to the reverser a back-tack of the lands, for payment to him of the interest of the sum in the wadset, it is, doubtless, an improper wadset: but if the back-tack shall be reduced, or irritated for non-payment of the tack-duty, it becomes thereafter a proper wadset, unless there is some clause in the disposition or reversion, which may import otherwise^c, as shall be fully explained hereafter.

^c Decem. 4. 1666. Urquhart. Hume decis. 12.

THE creditor, in possession by an improper wadset, is liable to account for the rents, and to use ordinary diligence for recovery of them, from the time of his entry to possess; and will get allowance of what he could not recover, and, of all other deductions, public burthens, ministers stipends, and the free overplus rent beyond the interest, will be yearly imputed in payment of the principal sum; and when it is fully

fully paid, the reverfer's right becomes absolute, without neceffity of his being reinvefted, as is the cafe of adjudgers in poffeffion during the legal.

WADSETS are redeemable upon payment of the fums contained in the reverfion, unlefs thereafter other fums are eiked or added to the reverfion : in this cafe they muft likewise be paid, as well as the original fums, before redemption can proceed. An eik to a reverfion is a writing, whereby the reverfer acknowledges the receipt of a farther fum from the wadsetter, and therefore eiks or adds the fame to the fums in the reverfion, and declares that the lands fhall only be redeemable upon payment of the fums originally due, and thofe likewise fuperadded by the eik. Not only a proper wadfet is capable of an eik, but likewise an improper one, both being rights of property. But if the improper wadfet is clogged with a back-tack to the reverfer, without an addition to the back-tack duties, or declaring the back-tack void, there can be no eik; becaufe the wadsetter's right is limited to the back-tack duties, and therefore an eik to fuch improper wadfet will not be good againft a fingular fucceffor in the reverfion*. Nor can an eik be made to the reverfion of an infeftment of annual-rent; for the annualrent is a kind of limited fervitude, conftituted by infeftment, which cannot be enlarged by an eik to the reverfion, and it can only quadrate to the annualrent. Eiks to reverfions muft be regiftred duly, viz. within 60 days of their dates, in the fame manner as the reverfion itfelf, in order to affect onerous fingular fucceffors in the lands, becaufe it becomes part of the reverfion.

21. Eiks to a reverfion; what rights capable of them; not effectual if a mid-impediment interven.

a Feb. 18. 1708. lord president.

EIKS to a reverfion may be made to all rights of property, granted for fecurity or relief of fums; becaufe the difpofition itfelf is the fecurity, whereof the reverfion may be extended, in the fame manner as in proper wadsets. Nor is this difcharged by the ftatute^b, which declares difpofitions for fecurity or relief of fums contracted, or to be contracted, only to ftand good for what is contracted at the time of the infeftment taken thereon: for it is not in virtue of fuch claufe that the fums eiked are fecured, but by the eik itfelf, which being recorded in the register of feifins and reverfions, within 60 days of its date, is equally effectual with the original reverfion itfelf. If there is any mid-impediment, the eik will not be effectual; for if others have, in the mean time, between the wadfet and the eik, got infeftments, or have adjudged the reverfion from the debtor, the eik cannot be prejudicial to them^c, becaufe they have the firft effectual right.

b P. 1696. c. 5.

c Jan. 16. 1677. Halyburton.

I HAVE already obferved, that a wadfet becomes improper by the wadsetter's letting back the lands to the reverfer, for a tack-duty equal to his intereft: this is termed a Back-tack, as being a counter-deed, by the wadsetter limiting his right, and fo needs no definite iffue or term of endurance, but only that it fhall continue till redemption. If the reverfion exprefsly relate to the back-tack, and declares that the lands fhall not be redeemable, till all the back-tack duties, as well as the principal fum, are paid; then the reducing or declaring void the tack, thro' any irritancy incurred, will not render the right a proper wadfet; which otherwife it would be, if the reverfion only bore payment of the principal fum, and that the wadsetter had relied on the

22. Back-tacks granted by the wadsetters to the reverfers; back-tack duties, when a burthen upon the reverfion.

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back-tack for payment of his interest; for then, as soon as the back-tack became void, the full right of property, by the disposition, revived, and the rents came in place of the annualrents; whereas, by such clause, the wadsetter relies on getting payment of his interest at the redemption, and depends not upon the rents for the same.

WHEN the reversion bears a proviso of payment of all the resting back-tack duties before redemption, they are a condition and a burthen upon the reversion, that the lands cannot be redeemed without payment of them; but are not *debita fundi*, nor effectual against adjudgers, or other singular successors in the reversion, who thereby acquire right to the back-tack, and are only liable for the current back-tack duties, during their possession, but not for bygones, unless they redeem the lands^a. If the reversion contain not the back-tack duties, the bygones are only a ground of debt against the reverser and his representatives, but not against singular successors therein. But singular successors in the reversion are still liable to the current tack-duties, during their possession^b; because they must own the back-tack, for without it, the wadsetter's right of property is preferable for the whole rents. A wadsetter therefore cannot insist in a poinding of the ground for his back-tack duties in arrear, more than an heritor can, for his rents, a wadsetter, whether proper or improper, being such till the lands are redeemed. He may only take decree for the same, and thereon adjudge the reversion, or otherwise operate his payment^c.

^a Jan. 16.
1677. Haly-
burton.

^b Jan. 22.
1633. Gor-
don.

^c Feb. 26.
1632. lord
Gerthland,

23. The back-tack may be voided by declarator of irritancy; not good against an onerous singular successor in the wadset, unless incorporated, or duly registered.

BACK-TACKS, either ingrossed in wadsets, or relating thereto, may be declared void, or irritated, as other tacks, upon a declarator for non-payment of the tack-duties during the space of two years, tho' no irritancy is contained in them; because, by our common law, that is the case of all tacks and feus, even where the irritancy is not expressed. If the back-tack is not engrossed in the wadsetter's infestment, an onerous singular successor in the wadset is not concerned with it, unless it is duly registered in the record of reversions; for tho' other tacks, clothed with possession, are good, by the statute, against singular successors, yet that cannot concern back-tacks relating to wadsets, which can never be understood clad with possession, by the heritor's continuing to possess; and the purchaser of a right of property, which a wadset is, is not chargeable with any burthen or limitation of his right, but such as is either ingrossed in his author's infestment, or duly recorded in the register of seifins and reversions, as the statute directs^d.

^d P. 1617.
c. 16.

24. The order of redemption; procedure in it either in legal, or conventional reversions.

WADSETS and adjudications, during the legal, are extinguished by lawful redemption, which must be made, by using an order of redemption in due course. The order of redemption is used, by due premonition of the creditor to receive his money, and consigning it on his refusal. This, in adjudications, may be done upon as many days notice, as the adjudger can be in readiness to receive the money, the law having prescribed no limited time. In voluntary rights or wadsets, it must be done in the terms of the reversion, which, for most part, bears a particular place for the creditor's receiving the money, or the debtor's consigning it, on his refusal, on premonition of

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of 40 days preceeding the term of Whitsunday or Martinmas ; and, if the term for consignation, mentioned in the reversion, happens to be Sunday, the premonition must be to the day preceeding, and not the day after, otherwise the order is void^a. An instrument must be taken upon the premonition, and if it is made by a factor, or singular successor in the reversion, it must bear production of the premonisher's title, if it was called for by the party against whom it was used^b.

^a Fount. Dec. 17. 1702. Ogilvie.

^b Jan. 18. 1662. Veitch. Jan. 12. 1677. Wamfrey.

WHEN the day of payment, according to the premonition, comes, the debtor, or his procurator, must appear, at the day and place appointed, and tender the money to the creditor; and, if he is willing to accept, and is vested with a title to receive the money, he must sign and deliver a sufficient renunciation of the wadset, which must be registered in the record of reversions within 60 days^c. But, if the wadset was by a public holding, the wadsetter must further grant a disposition, with procuratory of resignation, that the debtor may be invested in his estate, for, by the public holding, he was fully denuded. In case the creditor do not appear at the time and place to which the premonition was made, or refuse to accept of the money, or is not in capacity of renouncing the wadset, and re-disposing the lands, or offers an insufficient renunciation, the debtor may consign the liquid sums, and security for performance of what is illiquid, and take instruments in the hands of a notary upon the consignation^d. This instrument must bear production of the reversion, if it is on a writing apart, with the party's title thereto; or, if 'tis ingroft in the wadset, refer to it, and that he attended from mid-day till sunset. The consignation generally is upon the configner's hazard, and therefore it may be in the hands of any person he pleases, and thereafter he may take up the money, and present it at the bar, with interest from the time of the order, without prejudicing the order^e.

^c P. 1617. c. 19.

^d July 10. 1634. lord Balmerino.

^e Decem. 8. 1671. Forrest. Nov. 29. 1672. duke Buccleugh.

If the creditor is out of the kingdom, letters of supplement, under the signet, will be granted for premonishing him at the market-crofs of Edinburgh, pier and shore of Leith, upon 60 days; and, if he is minor, his tutors and curators must be premonished, upon letters of supplement, at the market-crofs of the head-borow of the shire where he resides^f, unless they are premonished personally, or at their dwelling-houses.

25. What if the creditor is out of the kingdom, or minor.

^f June 15. 1680. Gordon.

If no time or place be mentioned in the reversion, for using the order, I conceive the same ought to be used, in the same manner, as in redeeming adjudications, viz. that the premonition, tender and consignation, be made in time and place convenient: in such case, the learned Craig is of opinion, that, where no place is mentioned in the reversion, the tender ought to be made to the creditor personally, or at his dwelling-house; and, if he has none, that he ought to be premonished, by letters of supplement, at the market-crofs of the head-burgh of the shire, and that the consignation be made in the parish-church where the lands lie^g.

26. Or no time or place is mentioned in the reversion.

^g L. 2. dieg. 6. § 4.

I HAVE already observed, that, in adjudications, where the adjudger is in possession, a summons of count and reckoning, or declarator

27. The order of redemption in

adjudications.

clarator of extinction, raised within the legal, will serve in place of an order and declarator of redemption; but otherwise, where an order of redemption is used, the sum must be consigned, upon the creditor's refusal to accept it, and to renounce the adjudication, in the same manner, as in the case of wadsets, premonition being duly used against him, as above. I shall have occasion afterwards more fully to discourse of adjudications^a.

^a B. 3. tit. 2.

28. How does redemption of wadsets proceed against an heir.

AN order of redemption being used against the wadsetter, who thereafter dies, declarator of redemption may proceed thereon against his heir, without any decree on the passive titles against him, where the wadset held of the granter; because it is only to declare the lands orderly redeemed, and nothing is concluded personally against the heir. And, for the same reason, an order may be used against the heir, and declarator insisted thereon against him, without any charge to enter heir; but, if the wadsetter was infest by a public holding, the heir must be concluded against, to enter heir in the lands to the deceased, and denude himself; in which case a charge is necessary, and a decree against him for that purpose; or that, upon the heir's renouncing, a decree, *cognitionis causa*, and an adjudication of the right may proceed.

29. Declarator of redemption. If the wadset was holden of the superior, the wadsetter, or his heir, must denude themselves of the property.

THE order duly used founds the reverser in a declarator of redemption, to have it found and declared, by decree of the court of session, that the lands are lawfully redeemed, and that the defender be decreed to denude himself thereof. The grant of redemption, or renunciation produced in this process, must be duly registred, within 60 days of the decree thereon, by which it becomes a complete deed, being thereby ordained to be given up to the pursuer^b. If the wadset was by a public holding, the creditor must convey the lands, as above, and his heir will not be allowed to take up the consigned money, till he perfect titles to the lands, and denude himself thereof by an absolute disposition, with procuratory of resignation, and all other clauses needful, in favour of the reverser; but otherwise, a simple discharge or renunciation, duly recorded, is sufficient to extinguish it, as it will an adjudication^c.

^b P. 1617.
^c 16.

30. Who answerable for the money consigned.

If the reverser took up the consigned money, he must produce it at the bar, with interest from the term at which the order was used, but otherwise he is not liable to reproduce the money, nor for interest; and the creditor will be impowered to receive the consigned money, and get letters upon the instrument for charging the consignatory to give it up; but the bare instrument of consignment will not be a sufficient instruction against him, without his own receipt; however the reverser, who chuses the consignatory, is answerable for his making forthcoming the money to the creditor.

^c Jan. 10.
1665. Campbell. Jan. 14.
1630. Laurie. Dec. 7. 1631.
Grierfon. June 21.
1626. Murray. Jan. 21.
1673. Nicol.

31. Reverser may take up the consigned money, and pass from the order, before acceptance by the credi-

THE effect of the order, when duly used and insisted in, is, that the creditor is liable to account for the rents from that time, and in the costs of suit, if he had no probable ground of plea; as, in case the order was regularly used, he can scarce be presumed to have; for frequently, wadsets being beneficial, the creditor is unwilling to quit the possession, and therefore forces the reverser to a vexatious action,

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to recover it. The reverser may take up the consigned money, and pass from the order, at any time before acceptance by the creditor, or decree of declarator; so that, till then, the sums consigned do not become the creditor's, and for that reason will not fall to his executors. Only those against whom the order was used, or their representatives, in case of their death in the interim, need be called in this action; for the rights flowing from the wadsetter, holding of himself, fall in consequence with their author's, but it is incumbent on the wadsetter to put the reverser in possession ^a.

tor, or decree of declarator.

^a Feb. 17. 1665. Pringle. Feb. 9. 1676. Clapperton.

^b Feb. 19. 1674. lord Borthwick.

^c Nov. 13. 1711. Douglas.

If there was any small neglect in the order, as the not production of the reverser's title, or the procuratory, the court will sustain the order, to take effect from the time these are produced^b; but, if there is an essential defect in it, as where the terms of the reversion are not observed, or the user of the order had no title at the time in his person, they will absolve the defender from the suit ^c, which will oblige the reverser to use a new order in due form.

32. Small neglects in using the order not regarded; but an essential defect in it voids the same.

^d June 18. 1675. Leys.

If the person, against whom the declarator was obtained, was only apparent heir, and died before making up titles, the consigned money will not belong to his executors, but to such heir as shall make up titles to the lands, and renounce the wadset^d; whereas, if the decree had gone against the wadsetter himself, his executors would have been intitled to the wadset-sum, the wadset being thereby extinguished; which is not the case, where the decree is against an apparent heir, whose executors can no more claim the wadset-sum, than his heir could the lands, had the order not been used. If he, against whom the order was used, has other rights in his person, the declarator of redemption will proceed, and the defender be ordained to cede the possession, which commenced upon the rights redeemed, reserving his other rights, as accords^e.

33. If the defender was only apparent heir, and died after decree, the next heir must vest himself with a right to the subject, and is intitled to the consigned money.

^e Feb. 22. 1631. Murray. Nov. 22. 1677. Stewart.

SOMETIMES the reversion provides, that the debtor shall grant a tack or lease of the lands, for a certain number of years, to the creditor, to commence after redemption. In this case, the order of redemption ought to bear an offer of a tack in the terms covenanted, and a consignation thereof accordingly; but, if the tack was at an exorbitant advantage, far within the true value of the lands, as it was at the time of the contract of wadset, the paction is void, as usurious: however, the reverser, in using the order, ought, at any rate, to consign a tack in terms of the reversion, under protestation, that he shall be at liberty to challenge the same, if it is exorbitant. I have discoursed at large on such tack in the preceeding title.

34. A tack, covenanted to be granted on redemption, must be consigned, in using the order, under protestation of liberty to quarrel it, if against the statute 1449.

^f P. 1449. c. 19.

As wadsets, investments of annualrent, or other rights in security of sums, may be redeemed and purged, in manner foresaid, by the debtor, so they may be loosened, by the creditor his using requisition for his money; or, in case no requisition is made necessary, by a simple charge of horning for the sum in the wadset, or other security. The requisition must be in the terms of the clause concerning it, upon so many days as is thereby prescribed; it must be by way of instrument; and, if it is by a procurator, or a singular successor, bear production of the titles which empower them to receive the money;

35. Redeemable rights, loosable by the creditors using requisition or charge; the effect of the same; it may be paid from either expressly, or tacitly, by

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recurring to
the right
thereafter.

and it must specify a time and place for payment. If the reverser is dead, and his heir a minor, requisition must be used against him personally, or at his dwelling-house, and against his tutors or curators, upon letters of supplement, at the market-cross of the head-burgh of the shire where he dwells; nor will a decree of registration, or upon the passive titles, supply the requisition^a. If the requisition is defective or informal, it will have no effect, but is void. A charge following thereon will be suspended, and an adjudication led for the sums will be null^b: but, if the requisition is duly made, the diligences pursuant thereto will be good, and it renders the sum movable; so that, by the creditor's death thereafter, it will fall to his executors, unless it is provided in the security, that, notwithstanding thereof, the heritable right shall remain in force. The creditor may pass from his requisition, which is his own deed, at any time before payment or consignation of the sums by the debtor, in which case the heritable right revives^c. He may not only pass from it Expressly, but likewise Tacitly by receiving the interest that fell due thereafter, or by receiving the rents of the wadset-lands. If the creditor, after requisition, adjudge for payment of his sums, he may notwithstanding, in competition with others, return to his voluntary right, and claim his preference thereon, for the principal sum and interest, and use his adjudication, with respect to the accumulations only.

^a June 15.
1680. Gordon.

^b Nov. 13.
1622. Balf.
Jan. 18.
1665. Stewart.

^c Nov. 14.
1710. Ross.

If the sum is payable on a charge of six days, without requisition, a charge has the same effect as requisition, in order that the money may go to the creditor's executors; and where requisition is necessary, by conception of the deed, and the same is used, there needs no charge for that end. It is however to be observed, that tho' an adjudication led on a bond, payable upon requisition, be null, unless requisition is duly used^d, yet, when payable on a simple charge, the adjudication may proceed without any previous charge; because the sum in the bond is understood to be liquid, when the debtor is bound to pay it without requisition.

^d Feb. 11.
1680. Gordon.

36. Voluntary renunciation of wadsets not sufficient, when by public infestment; then a re-disposition necessary.

A WADSET, no doubt, may be extinguished by a voluntary renunciation of it, which is sufficient, if it holds base of the reverser, and must be registered in the record of reversions, within 60 days of its date, by the above statute, in order to have effect against onerous singular successors of the wadsetter. But, if the wadset is held by a public infestment, *viz.* of the reverser's superior, the wadsetter must re-dispose the lands to the reverser, his heir or assignee, on redemption, as above, and then the right must be perfected in the person of the disponent, by infestment, as any other right of property. If the wadsetter was not infest, then a single discharge, without necessity to register it, will extinguish the right to all effects, or the granter's retiring it will sufficiently free him.

37. In wadsets, by a public infestment, where the reversion is by a deed apart, is a letter of re-

If a wadset held of the debtor's superior, upon redemption, the superior, formerly, was not bound to receive the reverser, as being in the same case with any voluntary purchaser; and therefore it was necessary and frequent to have, from the superior, a letter of Regress, or obligation that he should receive the reverser upon his being repaid to the lands. But where the reversion is incorporated in the body

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body of the right, the superior's consent, to receive the reverser, after redemption, is implied, so that no separate obligation of regrefs was requisite. And now, by the late statute, any disponsee to lands, producing a conveyance, containing a procuratory of resignation, may compel the superior to receive him, upon payment or tender of the composition^a.

grefs from the superior requisite; after redemption, whether the subject deemed heritage or conquest.

THE debtor returning to his lands, by virtue of a reversion and regrefs, is but reinstated therein, and makes no new purchase; and therefore, as they were formerly heritage or conquest in his person, they still remain so after redemption, and, as such, will devolve on his heir, whether of line or conquest. But if the lands are redeemed, by an assignee to the reversion, they are, no doubt, conquest in his person.

A REGRESS, or bond for granting it, must be registred in the record of reversions, within 60 days of its date; for, otherwise, by the statute 1617, it is not good against the onerous singular successor of the superior. In case of redemption of a wadset by a public holding, the superior will be intitled to a composition from the reverser, upon his re-entry, if the reversion was by a writing apart; but not if it was ingrossed in the right, or a letter of regrefs granted to the reverser, on which account, such writing, in that case, is still useful.

38. The use of a regrefs at present, to free from the composition.

^b P. 1617.
^c 16.

A REVERSION is, of itself, a personal right, and only made effectual against singular successors by statute, and therefore it may be conveyed by a simple assignation, which must be registred in the proper record of reversions, within 60 days of its date, in order to become effectual against singular successors of the reverser, by posterior more formal deeds^b. In this case, if the wadset held of the debtor's superior, the wadsetter must denude himself by a disposition, with a procuratory of resignation in favour of the assignee, upon redemption, in the same manner as he was bound to do in behalf of the reverser, had the right remained with him: and if it held of the debtor himself, the wadsetter must likewise convey the lands to the assignee, to be holden by him of the debtor; for a simple assignation to the reversion can only denude the debtor of the power or faculty to redeem, but not of the right of superiority standing in his person, which is quite different from the right of reversion. An assignation therefore to the reversion can only entitle the assignee to come into the wadsetter's place upon redemption, and so to hold the lands, either of the debtor's superior, or of the debtor himself, as the wadsetter did.

39. Assignations to reversions; a wadsetter must denude of the lands in favour of the assignee, whether the wadset was base or public.

THO' an assignation to a reversion must be registred as the statute directs, yet an adjudication of it needs not be registred; because the abbreviate thereof is on record. If the wadset hold base of the reverser, a disposition of the lands by the reverser, and investment thereon, carries the reversion, and needs no other registration than that of the seisin on the disposition; for the disposition carries all that is in the debtor's person, which is the superiority of the wadset, and the right of reversion: but if the reversion was formerly assigned, and the assignation duly registred, the disposition of the lands thereafter only carries the superiority.

40. Where the wadset holds of the reverser, a disposition of the lands by him carries the reversion; what if the reversion was formerly assigned.

As

41. Discharges of reversions must be duly registered, if the reversion was registered, but otherwise not; deeds effectual against heirs, good against gratuitous successors in the right; the case of unregistered reversions.

As a reversion may be conveyed properly by assignation, so it may be extinguished by a simple discharge, which must likewise be registered, in the terms of the foresaid statute, within 60 days of the date, in order that it may be effectual against singular successors of the reverser. But if the reversion itself is not registered, the assignation or discharge of it needs not be recorded; because a writing of the same force with the deed must be sufficient to convey or extinguish it; *Unumquodque eo modo dissolvitur quo colligatum est*, every right is dissolved by matter of as high nature as it was constituted. This can only hold, where the unregistered reversion is by a writing apart; for one incorporated in the infestment is a reversion, recorded by the registration of the infestment wherein it is contained; but, otherwise, a singular successor, in a reversion unregistered, does not contract on the faith of the records, and so cannot complain, if he is ensnared by a prior discharge or conveyance of it, tho' not upon record. Such unregistered assignation of a reversion is not a complete deed, till it is intimated to the wadsetter; because the register of seifins and reversions, &c. stands in place of intimation; and therefore the unregistered assignation to a reversion is in the same case as other assignations, to the perfection whereof an instrument of intimation is necessary. And indeed it is adviseable for the assignee to intimate his right to the wadsetter, to prevent his *bona fide* accepting payment from, and making a grant of redemption in favour of the cedent, or subsequent onerous assignee, even where the reversion and first assignation are duly recorded.

REVERSIONS apart were, of old, declared to be effectual against singular successors, even without registration^a, tho', for the reverser's security, a register was then appointed for them, and extracts out of it declared as probative as the principals; but there is no necessity, by that statute, imposed on the party to register them, which was afterwards well supplied by the act 1617. It is to be observed, that, in all cases, a reversion, tho' not registered, and an unregistered assignation to a registered reversion, have effect against gratuitous singular successors of the respective granters, in the same manner as against their heirs, by the rule that, *Ex cujus persona quis lucrum capit, ejus factum præstare debet*^b. One is subject to the person's deed by whom he profits, to the extent thereof; and it is fraud in the author to grant the subsequent deed, whereby he is guilty of the crime of Stellationate, by our law^c. And therefore it may be laid down as a general rule, that when a deed affects heirs, it does likewise gratuitous successors in the right, after discussing them.

^a P. 1469.
c. 27.

^b L. 149. ff.
de reg. juris.

^c P. 1592.
c. 142.

42. In wadsets of ward-lands holden of the superior, the deeds of the wadsetter forfeited only the wadsetter's interest in the lands; the ordinary casualties fall by his

It is doubted by some^d, if, in a wadset holden of the superior, deeds by the wadsetter did infer recognition to the prejudice of the reverser in ward-fees; but it would seem, that the superior having received the wadsetter, he cannot claim more by his deeds of forfeiture than the wadsetter's limited right of fee, and consequently that it must still be subject to the reversion, and redeemable upon payment of the sums wherewith it is charged; and if the reversion is apart, and duly registered, the superior is bound to take notice of it as well as others. As to the ordinary casualties of relief, non-entry, and liferent-escheat, (and formerly that of ward) they will, no doubt, fall by

^d Dirlt. verbo (recognition.)

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^a June 29.
1661. Tel-
fer.

by the wadsetter, who alone, in the case supposed, is the vassal. But that will not hinder the reverser to redeem the lands, the money being to be employed for the superior's use, according to his interest therein^a; for the damage thro' these casualties cannot be charged to the reverser, since they arise on the part of the wadsetter. But if the wadset is of lands holden base of the granter, the casualties fall by his death, and the wadsetter must be relieved of the same; unless it was by his own fault that he did not prevent them, by taking the right holden of the superior, if, by the conception of the same, he was at liberty to do it.

death or deed, without relief from the reverser; if holden base, relief competent for the casualties falling on the part of the reverser.

Observations on the Law of England, in relation to the Premises.

^a Coke 1.
inst. 205.

THERE is no doubt, but, in England, as well as with us, one may borrow money, and make an estate in lands to the creditor, to have and to hold the same to him and his heirs, till they have received the sum borrowed out of the rents and profits of the lands^a, which is of the same nature with our improper wadsets; or even upon condition that the creditor shall enjoy the rents and profits of the land, in lieu of his interest, till the money is repaid by the borrower, which is the import of our proper wadsets, but such kind of rights are seldom used.

1. Rights, similar to proper and improper wadsets, take place in England, but not frequent.

^b Littl. 332,
&c. et ibid.
Coke.

THE more frequent method in England is, to take the security by way of Mortgage; so called, as being *Mortuum vadium*, a dead pledge, in contradistinction to the other method of security, which may be called *Vivum vadium*; because, in this last, the land is not forfeited or lost. A mortgage is where "A feoffment is made, upon condition, "that if the feoffor pay, at a certain day, a sum covenanted, he may "re-enter, and that otherwise the land shall be the feoffee's, or the "mortgagee's for ever." In this case the feoffee may enter presently to the lands; but generally the feoffor holds the possession, and, upon failure of payment at the day, the feoffee may enter^b.

2. Mortgages commonly used in England; the nature of them.

^c 2. Vent.
340.

THO', in strict law, the mortgagee has an absolute right to the lands, upon failure of payment within the time limited, yet the mortgagor has an equity of redemption in the court of chancery: and if the mortgagee was in possession, he may be brought to account for the intermediate profits: but this redemption is not allowed after 20 years from the time of the forfeiture, and the mortgagee's entry to the possession thereon^c.

3. How far the equity of redemption competent to the mortgagor, after expiration of the term of redemption.

IT is a rule in equity, before the court of chancery, "that he "who will have equity to help him, where the law cannot, must do "equity to the party against whom he seeks to be relieved." Upon this foundation, if the mortgagor borrows more money of the mortgagee upon bond, where the heir is bound, and dies, the heir of the mortgagor shall not be allowed to redeem without paying the bond-debt, as well as that secured by the mortgage; because, when the condition is broken, so that the interest becomes absolute in the mortgagee, if the heir of the mortgagor will have equity, he must do equity by payment of the whole sums due. But if a bill were exhibited by the mortgagee to foreclose, it is sufficient, that the heir of the

4. If the mortgagor borrow more money from the mortgagee upon a simple bond, how does the redemption proceed, either in a question with the mortgagee, or a purchaser from him.

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mortgagor tender principal sum and costs, without the bond-debt, which was not originally any lien on the land. Or, if the heir of the mortgagor alien the land, the purchaser, on a bill brought by him for redemption after forfeiture, shall only be obliged to pay the mortgage-money, but not the bond-debt, in which he is not concerned ^a.

^a Bac. new abr. (mortgage) 651, &c.

By our law, in the like case, a reverser, or his heir, and much more his singular successor, would only be obliged to pay the sum contained in the wadset, when he insists to redeem the same, but not any other sum thereafter borrowed from the wadsetter; unless the same were eiked or added to the reversion, in which case it becomes, in effect, a part of the wadset sum; and that either in using an order of redemption, and a declarator thereon, or in defending against a declarator of irritancy, at the suit of the wadsetter, to foreclose a temporary reversion.

5. How far is the mortgagee answerable for the rents and profits of the lands in his possession.

A MORTGAGEE in possession is answerable for the profits he makes of the lands, but not for the profits he might have made, unless there were fraud; for he is not bound to the trouble and pains of making the best of what is another's, whose fault and laches it was to let the lands lapse into his hands, by non-payment of the money at the day. If principal and interest are overpaid by the mortgagee's possession, the parties may shake hands, for there is no refunding ^b.

^b Bac. ibid. 657, &c.

6. The case of a third mortgagee buying in the first mortgage; the chancery may lengthen, but cannot shorten the time of payment.

WHERE lands are mortgaged thrice, it is allowed, in the court of chancery, to the third mortgagee, to buy in the first incumbrance, to protect his own mortgage, and he shall hold the land against the second mortgagee, unless he is satisfied the money he paid to the first mortgagee, and also what he lent upon the last mortgage ^c. The court of chancery cannot shorten the time of payment of the money that is given by express covenant of the parties, but may lengthen it; and then, upon non-payment, the practice is to foreclose the equity of redemption, and to make the estate absolute to the mortgagee ^d.

^c 2. Vent. 338.

^d 2. Vent. 348.

7. If the mortgagee possess, and prevents other incumbrancers, he is accountable.

WHERE the mortgagee enters to the possession, and thereby prevents other incumbrancers from entering, and, notwithstanding, permits the mortgagor to receive the rents and profits, he shall be charged with the same, or such as he might have received since his entry ^e. This is the rule followed by our law in such similar cases.

^e Vin. (fraud) p. 524.

8. What if the value of the lands, possessed by the mortgagee, is excessive.

If the value of the lands, in possession of which the mortgagee is put, is excessive, the court of chancery will decree him to account for the rents and profits, notwithstanding a proviso in the mortgage "to retain the profits in lieu of the interest ^f." This is similar to our proper wadsets; but, in such case, the convention of the parties behoved to be observed; the wadsetter would not be compelled to account, since he is presumed to have lived upon the rents, and consumed them as his own; and it was the reverser's fault he did not redeem sooner: and the accounts would not be easily made up; for the party could not imagine he was to be accountable, and therefore probably kept no accounts of the same.

^f Vin. (mortgage) p. 438.

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WHERE a mortgage is made redeemable, during the life of the mortgagor only, his heir may, notwithstanding, redeem; or, if it is limited to him, and the heirs-male of his body only, this will not exclude his heir-general; for it is a certain rule, *Once a mortgage, always a mortgage*. And if there is a covenant, that it shall be redeemed only with the mortgagor's own money, he may notwithstanding redeem it with money borrowed, such clauses being rejected, as repugnant to the nature of the security^a. This last is likewise a rule with us; but where the reversion is limited expressly to the reverser himself, that he can only redeem in his own life, his heirs, tho' of his body, will be excluded, unless there was an order of redemption used by the reverser himself.

^a Vin. ibid. 259, &c.

THE rule for redemption of mortgages, even after forfeiture, by relief in equity before the court of chancery, is, that it behoved to be made within 20 years after forfeiture and possession of the mortgagee, as above; for the quiet of mens estates required such limitation, one's neglecting to pursue his right, for so long time, being deemed a dereliction of the pledge; but, if there is a covenant, that the mortgagee shall enter and hold the lands till he is satisfied, no length of time excludes the redemption^b. And, by a late statute^c, it is declared, that in all actions at law, relating to mortgages, if there is no suit in equity to foreclose the redemption, the tender of principal, interest, and costs by the person having right to redeem, pending such action, and, on refusal, the bringing it into court, shall be deemed a satisfaction.

^b Ibid. p. 467.
^c 7 Geo. II. c. 20.

NOTWITHSTANDING a decree by the first mortgagee, to foreclose the mortgagor, a second mortgagee, or subsequent incumbrancer, may redeem the first mortgagee, upon payment to him of his principal and interest, and likewise of the costs in obtaining the decree of foreclosure^d.

^d Vin. ibid. p. 445, &c.

WHERE the time begins upon the ancestor, as to redemption of mortgages, it shall run on against an infant heir^e. In like manner, the legal reversion of adjudications runs with us against minors, but they may notwithstanding redeem at any time within their age of 25 years; and in temporary conventional reversions, (which are of the same nature with mortgages in England) the time runs against minors; but either minors, or even majors, may redeem at any time within 40 years of the expiration of the term, as I have observed above.

^e Vin. ibid. p. 468.

^f 4 and 5 W. and M. c. 16.

It is provided by statute^f, That if any person shall borrow money, and for payment suffer a judgment, statute or recognizance, and after borrow another sum of another, or, for other valuable consideration, shall mortgage lands to the second lender, and not give notice to him of such judgment, &c. before execution of the mortgage, such mortgagor shall have no benefit, or equity of redemption, of the lands mortgaged; unless he, or his heirs, shall within six months pay off and discharge such judgment, &c. and cause the same to be vacated and discharged by record; and that if any person shall once mortgage lands for a valuable consideration, and again mortgage the same lands

9. What if the mortgage is made redeemable by the mortgagor only; or by the heirs-male of his body, may his heir at law redeem; or if only with his own money not borrowed.

10. Within what time, after forfeiture, is the equity of redemption allowed to the mortgagor.

11. What if the first mortgagee has obtained a foreclosure.

12. Where the time begins upon the ancestor, it shall run on against an infant heir, in redemption of mortgages.

13. What if one borrow money upon mortgage, and do not give notice of former incumbrances on the lands.

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lands to any other person, and shall not discover in writing to the second mortgagee the first mortgage, he shall have no relief, or equity of redemption, against the second mortgagee, who shall be intitled to redeem any former mortgage.

14. The mortgagee dying before the day of payment; is the sum payable to his heirs, or his executors.

THE mortgagee dying before the day of payment, the redemption money shall be paid to his executor, tho' he is not named, but not to the heir, unless he is named: and if the words of the condition be to pay to the feoffee, "his heirs or executors," the feoffor has his election to pay to either the heir or executor, when the mortgagee dies before the day of payment; and tho' the heir be particularly named, yet, after the day of payment is past, the sum shall belong to the executors^a. And, in the chancery, it is a constant rule, that money to be paid on mortgages, upon the death of the mortgagee, after the day of payment, shall go to the executors^b.

^a Coke 1. inst. 210.
^b 2 Vent. 348.

OUR wadsets, with a temporary reversion, and irritancy of the reverser's right, in case of non-payment at the time limited, have great resemblance of mortgages, but there is some diversity between them. As relief is granted in chancery, after lapse of the day of payment, so, in such cases, when a declarator of irritancy of the reversion is sued, the court of session allow the same to be purged, or the condition to be satisfied at the bar, or within such short time as the court shall appoint; and, upon non-payment at such day, they will declare the absolute property of the lands to belong to the wadsetter: but, if the reverser neglects, for 40 years after expiration of the term of reversion, to use means to redeem the lands, the court will not repon him to the equity of redemption, such claim, as all others, being cut off by the long prescription.

As to the excluding the debtor from redemption, when, upon granting a new security upon the lands, he does not give notice of the former incumbrance, we have our records to certify parties who purchase lands, or lend their money upon securities on them; so that the second contracter has himself to blame, if he does not consult the records, and the debtor incurs no penalty for not giving notice of former incumbrances: nor can a third wadsetter, by redeeming the first, have any other privilege, in a question with the second wadsetter, than a preference upon the first, so far as it goes, but cannot plead it as a ground of preference for the sum in his own security, the second wadsetter having no concern, whether the first wadset remains in the person of the original creditor, or is conveyed to any other. Sums due upon wadsets, or other infestments in lands, always go to the heir by our law, but the bygone rents, or interest of the sums, belong to the executors of the creditor.

15. In a conveyance or lease of lands, or other subjects, any reserved interest can only be in favour of the feoffor or lessor.

It is a general rule in the law of England, that conditions of redemption, or other benefit and interest in lands, or other subject conveyed, gifted or leased, can only be reserved to the feoffor, donor or lessor, and their heirs or representatives, but not to a stranger: and, by implication, the law reserves the same benefit to the heir of the feoffor; (tho' not named) for, as he is prejudiced by the conveyance, it is reasonable he should have the same advantage as his ancestor^c.

^c Bac. new abr. (conditions) 400.

In

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In this our law differs, for one may convey his estate, reserving any interest of redemption, or otherwise, to a third party.

IF an estate be conveyed to a feme covert, or an infant, under certain conditions or reservations in favour of the grantor, they shall be bound to perform the same; because this does not charge the person, but the land, which they cannot hold, without performing the conditions of the grant^a.

^a Bac. ibid.

16. A feme covert or infant is bound by the conditions in the conveyance to them.

THERE are other securities upon lands, by the law of England, some of which I shall briefly mention. Of this kind are those called Statutes. A statute merchant, is "a bond of record, acknowledged before the mayor of a city or borow, or others assigned for that purpose^b." A statute staple is "a bond of record, acknowledged before the mayor of the staple^c." In virtue of these bonds, if the obligor pay not at the day, the obligee may have execution of the body, lands, and goods of the debtor; and if such execution proceed upon the lands, the creditor is tenant by statute, merchant or staple, till the debt is levied and paid. They are called *Statutes*, because they are founded upon express statutes, which direct the proceeding thereon.

^b 13 Edw. I. de mercat.
^c 27 Edw. III. c. 9.

17. Statutes merchant, and statutes staple, bonds of record; execution upon them, against the body, lands, and goods of the debtors.

A RECOGNIZANCE is called a Statute Staple, but improperly; it is "a bond of record, testifying, that the recognizor owes to the recognizee a sum of money." Recognizances are of different sorts; one of them is founded upon the statute of Henry VIII^d. and is entered into before the chief justice of the king's bench, or common pleas, in term time, or (in their absence in vacation time) before the mayor of London and recorder, jointly, according to the form thereby directed. This kind of recognizance may be used by all persons, for payment of debts, or to strengthen other assurances.

^d 23 H. VIII. c. 6.

18. Recognizances, how entered into.

EVERY statute, merchant or staple, and recognizance taken according to the above quoted statute of Henry VIII. must be inrolled, within four months, in the office of the clerk of recognizances, or otherwise shall not be good against purchasers of lands chargeable therewith. The execution competent upon them, is called an Extent, and the body of the connusor, (if he is lay) and all his lands, tenements and hereditaments, that were in his hands at the time of acknowledging the same, or after, are liable to the Extent; his goods and chattels are likewise subject thereto^e. This is a judicial redeemable security, as to the lands upon which execution proceeds.

^e Coke 3. rep. 14.

19. How far statutes, merchant or staple, and recognizances, good against purchasers; a writ of extent proceeds upon them; the effect of it.

ANOTHER judicial redeemable security on lands, is an estate by *Elegit*. Where one recovers debt or damages by writ, he may within the year have a judicial writ, called *Elegit*, (from these words in it, *Elegit sibi deliberari*) to have execution upon all the parties goods, (beasts of the plough excepted) and half of his lands or tenements, delivered to him by the sheriff, till his debt or damages are fully levied: the moiety of the lands, in this case, is only delivered, because the other moiety is left with the debtor, for his support in the mean time. This proceeding is introduced by statute^f. The moiety of the lands is to be understood of such lands as the defendant had at the time of the judgment given. The goods are given to the creditor

^f Westm. 2. ch. 13. or 13 Edw. I.

20. A writ of *elegit*. Tenant by *elegit*.

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ditor, by reasonable price or appraisement, and the half of the lands by reasonable extent^a. If the goods and chattels appear to the sheriff sufficient to pay the debt, he ought not to extend the lands; and, if the party satisfy the debt, he shall enter into his lands^b. While the creditor possesses the lands upon this writ, he is tenant by *Elegit*, till the debt is levied or paid.

^aCoke 2.
rep. 74. Hob.
58, 59.
^bCoke 2.
inst. 395.

21. A parallel between these securities, and our appraisings and adjudications

OUR old appraisings had some resemblance of this, for the sheriff or messenger behoved first to search for the debtor's movables, to be distrained for payment, and if these were sufficient, he was to proceed no farther; but then, in default of movables, he was to apprise lands by the verdict of an inquest, sufficient to pay the debt, redeemable by the debtor in a limited time; but thereafter the whole lands were appraised or adjudged, without regarding the amount of the debt. An extent is of the nature of such general adjudication; the principal difference is, that if the debt adjudged for is not fully paid, by the rents and issues of the lands, within the term of the reversion, the same belong irredeemably to the adjudger, if the proceedings are regular, and liable to no challenge. But, in an extent, the debtor may at any time enter to his lands, after the debt is fully paid by levying the rents, or otherwise. We have no such securities, as statutes merchant, staple, or recognizances; and, if creditors want real securities upon their debtors lands, they must have infeftments thereon upon record, or sue adjudications of the same.

T I T. XI.

Extinction of Fees, or Infeftments.

I HAVE hitherto spoken of the constitution of infeftments of all kinds, and shall of their transmission in the next book, according to the method laid down in the entry. Therefore I shall here treat of their dissolution or extinction, wherein I shall confine myself to the ways of extinction peculiar to feudal rights, which is either by consolidation of the fee with the superiority, or by forfeiture of the same to the superior. As to forfeiture of feudes to the king, I am to discourse on it, among other confiscations, in the proper place^a.

^aB. 3. tit. 3.

SECTION I. *Extinction of the Fee by Consolidation.*

1. The state of fees originally, thereafter, and at present.

ANTIENLY fees were merely precarious, revocable at pleasure by the superior. In process of time they were granted, during the life of the vassal, and so were proper liferents of the subjects; and, last of all, these donatives were made hereditary to the vassal, and the heirs-male of his body; and, for that reason, in default of such heirs of the vassal, they returned to the superior, by the condition of the grant, according to the feudal customs of the Lombards^b. But which was not our law, by our antient feudal customs; for, in default of heirs-male of the vassal's body, his heirs-female succeeded. Indeed, in default of the heirs of the vassal, the lands escheated to the superior, whether such was the king, or any other over-lord^c; but which was altered by subsequent usage, so that the king is last heir, of whomever the lands were holden.

^bL. 1. tit. 1.
tit. 20. l. 2.
tit. 90. feud.

^cReg. maj.
lib. 2. c. 55.

If

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IF the right is granted to the vassal, and *heirs of his body*, or *his heirs-male*, without any termination upon *heirs whatsoever*; failing those heirs of provision, the fee becomes simple, and so devolves on the vassal's heirs whatsoever, or heirs of line, who, by the provision of law, would succeed in the right, tho' there was no mention of heirs therein at all, and therefore are called *heirs at law*: now the inserting a series of heirs, and neglecting to subjoin the last termination, that, failing those heirs of provision, the right shall go to heirs whatsoever, can put the heirs of line into no worse case, in default of those heirs, than they would be, were there a total omission of heirs. Of this I shall treat more fully afterwards^a.

2. In fees provided to heirs-male, or of provision, without the termination, failing those to heirs whatsoever, in default of the special heirs, the heir of line intitled to succeed.

^a B. 3. tit. 5. sect. 4.

THE fee returns to the superior, and thereby becomes extinct, either by consent of parties, by descent, by legal diligence, or by the vassal's feudal delinquencies: the first happens by resignation of the fee *ad perpetuam remanentiam*, in the superior's hands. The vassal either resigns personally, which is termed a resignation *propriis manibus*, or by virtue of a procuratory, or power of attorney for that effect. It is done by delivering to the superior the proper symbol, viz. a Bastion Staff or Pen, in the accustomed manner, by which single act it is perfected, being only in order to consolidate the fee with the superiority; whereas, in a resignation *in favorem*, or in favour of another than the superior, it is requisite that the superior, upon receiving the pen, or other symbol, instantly deliver it again to the purchaser, or to the vassal himself, if it is in his own favour. An instrument of resignation must be taken in the hands of a notary, setting forth the fact of resigning, and the whole solemnity; and when the same is in favour of the superior himself, it must be registred within 60 days of its date, in the record of seifins and reversions^b, which is only necessary in resignations *ad remanentiam*; because such resignation, and instrument thereon, sinks the property into the superiority, and so stands in place of a seisin; whereas, in resignations *in favorem*, the fee remains with the resigner, till the acquirer is infeft.

3. Return of the fee to the superior, by consent of the vassal, viz. by resignation *ad remanentiam*; the procedure in it.

^b P. 1669. c. 3.

IF the resignation is *propriis manibus*, the vassal must duly sign the instrument, for otherwise the instrument is the bare assertion of a notary, which is not probative^c; but if there is either disposition, or obligation by the vassal to resign, it will support the instrument, without the resigner's signing it. By this instrument of resignation *ad remanentiam*, there is a perfect consolidation of the fee with the superiority, in all time coming; for the superior standing already infeft in the lands, there needs no new seisin to complete the right in his person. The fee, by the resignation *ad remanentiam*, becomes extinguished, in the same manner as if it had not been granted, and the superior regains the same full right to the subject, by the consolidation, which he, his authors or predecessors, had before the fee was separated from the superiority.

4. Resignation *propriis manibus*; the effect of resignation *ad remanentiam*.

^c P. 1563. c. 81.

THO' seisin must be taken on the ground of the lands, yet resignation may be made any where; because seisin is a symbolical possession, introduced in place of the natural, in order that the right of property may be completed, and therefore must be upon the ground of the lands, in the same manner as the natural possession would be; but,

5. Resignation needs not be upon the ground of the lands.

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but, by resignation, no right of property is created : for, by a resignation *ad remanentiam*, the fee is extinguished, and, by that *in favorem*, a necessary step is only made, in order that the superior may be enabled to convey the property to the person in whose favour the resignation is made.

6. The effect of a simple renunciation.

A SIMPLE renunciation, which is only negative, but conveys no right, will not denude the vassal, nor infer a consolidation, tho' granted in favour of the superior ; because the vassal, who was vested in the fee, must be divested thereof, which, in this case, can only be done by an act of resignation or surrender in the superior's hands : but in servitudes, or even infeftments of annualrent, or in security, which are a kind of servitudes, a renunciation will extinguish them ^a.

^a Jan. 7.
1680. Mac-
Lellan.

7. Resignation in favorem infers no consolidation, even before the superior grants charter to him in whose favour it is made.

A RESIGNATION *in favorem* being only for a certain effect, divests not the resigner before the acquirer is infeft, nor infers any consolidation in the person of the superior, the resignation not being made for that purpose ; *Et actus agentium non operantur ultra eorum intentionem*, The deeds of parties can have no stronger effect than was intended by them : and here the intent of both is only that the resignation shall be a mean of conveyance of the subject to the disponent ; and, till he is infeft by charter from the superior, the casualties fall by the resigner's death, or otherwise upon his part ^b ; unless it is the superior's fault that did not grant a charter, which, by acceptance of the resignation for that end, he was bound to do. I shall have occasion to treat largely of resignations *in favorem* in another place ^c.

^b Nov. 14:
1677 Pur-
ves.

^c B. 3. tit. 2.

8. The superior, gaining the fee by resignation, a singular successor.

THE superior, where his title is as purchaser, is, by resignation *ad remanentiam*, as a singular successor in the fee, and liable to all deeds and debts of the vassal, to which singular successors would be subject, but to no other, more than a stranger who purchases would be.

9. The effect of resignation by one that has not the fee, with consent of him that is vested with it.

RESIGNATION by one that has no right, with consent in the same deed of him that has the right, is sufficient, because it is the deed of both ^d : but a supervening consent, or ratification by the true fiar, of a deed granted by him that had not the fee, will not be effectual to denude him ; for that must be done by a proper conveyance from himself, till which he still remains in the fee, notwithstanding such supervening consent or ratification, which can infer no conveyance.

^d Decem. 15.
1630. Stir-
ling. Decem.
11. 1662.
Ogilvy.

10. The vassal may renounce, or resign against the superior's will, and thereby may free himself as to subsequent casualties, unless the right is by way of contract.

THE fee is the vassal's property, and therefore he may renounce or resign it to the superior, without the superior's consent, or even against his will ; unless it is by contract of feu ; for then the vassal cannot free himself of his mutual obligation at pleasure. It is true, even where it is a pure right by a *deed-poll*, as the English lawyers speak, *viz.* by charter or disposition in favour of the vassal, and not by contract, the superior cannot be compelled to accept of a resignation *ad remanentiam* ; but then the vassal may abdicate or renounce the fee, which, tho' it will not convey it to the superior, and consolidate the same in his person, yet will liberate the vassal from all casualties falling thro' the fee thereafter, but will not free him from those that had fallen before his renunciation ^e. This question was of importance, where one held a small ward-fee of a subject, and none of the

^e Feb. 12.
1669. Brown.
March 26.
1628. Don-
glas.

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the crown ; for thereby, on his decease, the casualty of the marriage of his heir fell to the superior, which, in its avail or value, might be of more consequence than the whole amount of the ward-fee. And there may be feu-rights where the feu-duty exceeds the rent, as in houses which become ruinous, or lands which happen to be overflowed with sand, or otherwise totally wasted. But even, after the casualty is fallen, the heir of the vassal, who never had intermeddled with the fee, according to the course of our former law, needed not concern himself therein, and might avoid the effect of these casualties, whereto he was not personally liable, but which, as *debita fundi*, affected only the fee itself ; so that, by refutation or renunciation of the feude, he might free his person, and leave the ground of the fee to be pointed, or the fee itself to be adjudged for the casualty of marriage, tho' modified ever so high, or for any other casualty that incurred^a.

^a Jan. 15.
1681. lord
Dun.

If the vassal acquires the superiority, then he must perfect his right thereto, as any other purchaser behoved to do ; and, being duly infeft in the lands upon such title, he must grant a procuratory for resignation of the fee, *ad perpetuam remanentiam*, in his own hands as superior ; which being done, and the instrument of resignation duly recorded, there ensues a perfect consolidation of the fee with the superiority, and thereby the fee becomes extinct, in the same manner as when the superior purchases the fee or property from the vassal ; and the lands will thereafter descend, according to the destination of the same in the charter of the superiority.

11. Consolidation by the vassal's purchase of the superiority.

WHEN the superior succeeds to the vassal, or the vassal to the superior, in their respective rights, there is, on this occasion, an extinction of the vassal's fee by Descent ; but, in order to a full extinguishment, a resignation *ad remanentiam* is necessary, which the party may do, after he has made up a full title in his person by infeftment as heir in the subject succeeded to, by granting a procuratory for resigning the property in his own hands as superior. Such resignation wholly extinguishes the fee by consolidation, and absorbs or sinks it in the superiority. Hence the whole right will devolve according to the destination of heirs in the superiority, tho' different heirs were provided to the property before the consolidation. But if resignation *ad remanentiam* is not thus made, the fee and superiority will descend to the heirs to whom they were respectively provided, even where complete titles, by infeftment, were made up to both in the predecessor's person ; and, till resignation, distinct progresses must be always completed to the fee and superiority, which by such resignation is prevented ; and, till then, they are not consolidated, in my apprehension. Our noted stilest indeed is of opinion, that a superior's infefting himself on his own precept of *clare constat*, as heir to the vassal, infers a full consolidation without such resignation^b ; but I conceive that the superior's infeftment, even on a special retour as heir to the vassal, would not have that effect without a resignation *ad remanentiam*.

^b Dallas,
p. 567.

12. When the superior succeeds to the vassal, or on the contrary, there may be a consolidation of the property with the superiority ; this accomplished by resignation *ad remanentiam*.

In the case of the king, where he succeeds in lands to a subject, he must be served heir in special therein to the deceased, of which

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13. Consolidation, when the king suc-

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ceeds in
lands, or pur-
chases them.

two famous instances occurred; first of king Chareles I. who was served and retoured heir to queen Anne his mother, in the lordship of Dumfermling; and secondly, king Charles II. was served heir to the duke of Lennox, in the earldom of Lennox. But the king needs no infestment, his right being founded in his prerogative, and is not feudal, but allodial^a; and if the lands are holden of a subject, as his majesty cannot hold lands of another, they must be disposed of to a donatary, or sold to a purchaser, who, upon the king's presentation, must be received by the superior. When the king purchases lands, they must be resigned in his majesty's hands *ad remanentiam*, and the instrument of resignation duly recorded, as in other cases, to infer a consolidation of the same^b; a convincing argument that, in other cases, such resignation is necessary, in order to have that effect, as above.

^a Stair, p.
243.

^b Stair *ibid.*

14. Consoli-
dation by le-
gal diligence;
first by the
superior's ad-
judging from
the vassal the
fee, and
thereafter
using a
resignation
*ad remanen-
tiam*.

By legal diligence likewise the fee becomes extinct, when either the superior adjudges the fee or property from the vassal, or the vassal adjudges the superiority from the superior: in the first case it is the opinion of some of our eminent lawiers, that an apprising of old, and now an adjudication as coming in place of it, at the superior's instance against the vassal, infers a consolidation of the fee with the superiority^c. But, with all deference to those celebrated authors, I cannot agree with them; for an adjudication is only a judicial disposition, and has no higher operation than a voluntary one, and gives only *jus ad rem*, a personal right to the lands, and, consequently, till infestment be taken thereon, the right of fee remains in the vassal, against whom the adjudication was led; and a perfect consolidation cannot be effected, till the superior infest himself on his own precept, in the same manner as in the case of his succeeding to the vassal, and thereafter cause resignation to be made in his own hands *ad remanentiam*, upon a procuratory of resignation granted by himself for that purpose.

^c Spotsw.
(apprisings)
Stevenfon.
Diri. verbo
(consolidati-
on) et *ibid.*
Stuart. Stair,
lib. 3. tit. 2.
§ 22.

15. A supe-
rior can on-
ly make his
adjudication
effectual by
infestment.

As seldom one adjudication proceeds alone, but all the other creditors of the party, generally, insist in adjudications likewise, upon their debts, within year and day of the first, how can it be imagined that the one, led at the instance of the superior, hath a stronger effect than the others? Wherefore, as the adjudication is to be made effectual by infestment, or charge against the superior, in terms of the statutes 1661, and 1672, if the superior intends to make the adjudication at his own instance effectual, he must infest himself in the property, since he cannot charge himself. And this is the common case, where the lands adjudged hold of the crown, no charge being competent against the king. And if any other adjudger prevent the superior, by first charging him, his subsequent infestment could not avail; the first charge against the superior being declared sufficient to render the adjudication effectual.

16. Next, by
the vassal's
adjudging the
superiority,
and thereon
resigning the
fee *ad rema-
nentiam*.

WHEN the vassal adjudges the superiority, he may charge the superior of his superior, to receive him in the mean superiority, in the same manner as any other adjudger may; and no consolidation can happen, till he obtains himself infest, and make resignation, as is above observed, in the case of his succeeding to the superior. But still, in both cases of the superior's adjudging the fee, or the vassal's adjudging

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adjudging the superiority, the consolidation can never be firm and completed, till the legal reversion is expired, as is self-evident; nor unless they are the sole adjudgers, for otherwise all others, within year and day, have a proportionable interest in the subject adjudged.

It is a general rule, "that all securities on lands, that are extinguish-
"able by possession, cease, as soon as they are satisfied by the rents or
"fruits;" and tho' they are not proper titles of possession, as an infest-
ment of annualrent, yet, if such possession is attained by the creditor,
of the lands subject thereto, the security, even as to the principal
sum, will thereby become extinct. If such right be conveyed to
another, who is in possession, and the assignee recovers as much of
the rents as satisfies the same, it cannot be revived, by the cedent's
reducing the conveyance thereafter on the head of fraud, or any o-
ther personal ground^a, for that were to subject the debtor to double
payment; so that the party has no other remedy, than recourse on the
assignee that circumvented him, or otherwise wrongfully obtained
the right. Those rights are, no doubt, likewise extinguished by dis-
charges and renunciations from the creditors, as wadsets are by re-
demption, as I have shown in the preceeding title.

^a Feb. 22.
1751. Symer
contra Doig.

17. Extinction of infestments by the deeds of the parties.

It was thought of old, that, in default of heirs of the vassal, the fee, as escheat, returned to the superior^b: but now 'tis established law, that the king succeeds as *ultimus heres*, as was above mentioned, and shall be largely shown elsewhere^c.

^b Craig, lib. 2.
dieg. 17.

^c B. 3. tit. 3.

18. The fee returns to the king, in default of heirs of the vassal.

SECTION II. Extinction of Fees by Delinquencies.

ORIGINALLY, fees, proceeding from the liberal grant of the superior, were termed *Beneficia*, Benefices; and, for this reason, any crime that imported ingratitude or infidelity in the vassal, or rendered him unworthy or unfit to serve the superior, inferred a forfeiture, or return of the fee to the superior; as likewise did the superior's atrocious injuries to the vassal, whereby he counteracted the obligation of protection he lay under to him, infer a forfeiture of the superiority to the vassal^d.

^d Quon. attach. c. 19.
reg. maj. lib.
2. c. 67. lib.
3. c. 11.

19. Of old, superiority forfeited to the vassal, and the fee to the superior, by their respective crimes or offences against one another.

THE books of the feudal law of the Lombards are full of these delinquencies, both on the one side and the other; and the feudists treat of them largely. And the system of our old law, called *Regiam Majestatem*, lays this down as a rule, viz. "That the bond of fidelity
"between the lord and vassal is reciprocal; so that, how far the vaf-
"sal is bound to his lord, by reason of homage, the lord is as far
"obliged to him, by reason of the superiority, reverence only ex-
"cepted^e." Felony is the term, under which every crime, where-
by the fee is forfeited to the superior, is comprehended. By felony
likewise, in a more large acceptation, is understood every crime of
the superior against the vassal, whereby the superiority was forfeited
to the vassal, by the feudal customs then prevailing^f. Of these various
crimes, as grounds whereupon the fee was forfeited to the superior,
and, on the contrary, the superiority to the vassal, the learned Craig
treats at great length in his excellent book *de feudis*^g; for it would
seem, that in his time such was the law.

^e Reg. maj.
B. 2. c. 67.

^f 2 Feud. 26.
§ 5. 2 feud.
47.

^g Lib. 3. dieg.
3.

20. The crimes of the vassal against the superior, termed Felony in the books of the feudal law; the crimes whereby the superior forfeited his right to the vassal, likewise called Felony.

BUT

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21. The case at present, as to the forfeiture of the feude for crimes.

BUT thereafter, fees having become the subject of commerce, those feudal delinquencies were much less regarded. At present, the most atrocious personal injury, by the vassal to a subject superior, will not infer a forfeiture of the fee; nor will any crime whatever, committed by the superior against the vassal, be attended with a forfeiture of the superiority to the vassal. Crimes at present are punished as the law directs, without distinction of persons; nor is the relation between superior and vassal any other way considered, than as it concerns the casualties known in law, and established by custom.

22. By the statute 1 Geo. I. the vassal guilty of treason forfeited the fee to the loyal superior, (now repealed); and the superior, committing treason, forfeits his right to the vassal, but that peculiar to treason in favour of the pretender.

IT is true, by the late British statute, for encouraging the loyalty of the subjects of Scotland, in case of rebellion, or other treasonable practices in favour of the Pretender, it is provided, "That the superior who remained peaceable, and in dutiful allegiance to his majesty, his heirs and successors, shall be intitled to the property of the lands, holden of him by the person attainted of treason, in the same manner, as if they had been resigned in his hands by the vassal, *ad perpetuam remanentiam*." And, on the other hand, "that if the vassal remain loyal, and the superior not, the vassal shall be intitled to hold the lands, which the superior, attainted of treason, held of the crown, by the same manner of holding that the superior held them at the time of his attainder:" they observing the method prescribed in the act, for vesting themselves respectively in the right, and attaining possession^a. But that statute concerns only that particular rebellion 1715, or any other high treason, in favour of the pretender, that then was committed, or should be committed thereafter, and in some particulars it is limited to that rebellion. And therefore, in all other cases, feudes, like other rights, can only be forfeited either to the king or superior, by the crimes or delinquencies that by express law infer such penalty. And the above mentioned statute is now repealed, in all time coming, so far as concerns the superior's claiming the vassal's fee, upon the vassal's committing treason^b, of which I shall treat farther in another place^c.

^a 1 Geo. I. c. 19.

^b 21 Geo. II. c. B. 3. tit. 3.

23. The feudal delinquencies, disclamation and purpresture common to all holdings; and recognition, specially so termed, proper to wardfees formerly in use.

THE feudal delinquencies, inferring a forfeiture of the fee to the superior, by our law at present, and long since established, may come under the general name of Recognitions; because thereby the fee recognosces or returns, and opens to the superior. But particularly they are Disclamation and Purpresture, which are common to all fees; and Recognition, specially so termed, which was peculiar to wardfees; and the irritancy of a feu-right, *Ob non solutum canonem, i. e.* for non-payment of the feu-duty, which concerns only the holding in feu-farm. As to treason, which infers a forfeiture of lands and heritage to the crown, I shall treat of it among confiscations^d.

^d B. 3. tit. 3.

24. Disclamation; it is either judicial or extrajudicial; judicial, how inferred.

DISCLAMATION, as the very term denotes, is when the vassal denies or disowns his superior. This was regarded of old as a kind of treason, by the vassal's throwing off his allegiance, supposed to be due from him to the superior, as the matter was understood of old. It is either Judicial or Extrajudicial; judicial, when the vassal, pursued by the superior in any suit upon his right of superiority, denies the pursuer's title^e. This regularly he cannot do, without incurring the hazard of disclamation, or the forfeiture of the fee: but if the vassal,

^e 2 Feud. 26. § 3. 34. § fin.

bona

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^a Jan. 18.
1681. Earl
Queenberry.

bona fide, denies the pursuer's title to the superiority, he incurs no penalty by doing it. Thus, where the pursuer is singular successor in the superiority, he will be obliged to produce his progress thereto, before the defender be bound to answer^a; unless the defender has formerly owned his right, by taking charters from him. The same rule holds, where the vassal is singular successor, and never acknowledged the pursuer or his predecessors; and, in the case of a controverted succession to the superiority, the vassal, without hazard, may deny the pursuer to be lawful heir to the superior.

DISCLAMATION, as to a part, infers a forfeiture of the whole fee, holding of that superior who was disclaimed. But, if the vassal has neighbouring grounds, holding of different superiors, he may justly doubt his holding the controverted ground of the superior, who claims interest in it, without hazard of disclamation, which requires a malicious intent of throwing off allegiance to the true superior.

^b Stat. Ro. III.
c. 18.

^c 2 Feud. 34.
§ fin. reg.
maj. lib. 2.
c. 63.

^d March 26.
1628. Dou-
glas.

EXTRAJUDICIAL disclamation is inferred by facts, when the vassal knowingly takes investment of another, as superior, in prejudice of the true superior. But, as to extrajudicial words, they would not be regarded more than extrajudicial confessions, unless disclamation were made in a solemn manner, according to the order prescribed in our old statute^b, and that thereupon protest, under form of instrument, were taken. Probable ignorance here will likewise excuse the vassal from the severe penalty of loss of his property; because a crime can never be inferred, but where fraud and design appear, or are implied in the very act, which always supposes that it is knowingly done^c. When the vassal disclaims the superior, by denying his right in any suit for the casualties of the superiority, it is in the superior's option, either to admit the disclamation, and take the benefit of it, or produce his right of superiority, and proceed in his action^d; because a vassal cannot effectually renounce or disclaim, in prejudice of a casualty already fallen, as was formerly observed; and the superior, in whose favour the forfeiture, upon disclamation, is introduced, may pass from it at pleasure.

25. Extrajudicial disclamation, when inferred.

^e P. 1600.
c. 5.

THE second feudal delinquency, common to all feudes, whence a forfeiture thereof to the superior ensues, is Purpresture or Purprision, from the French word *Purpris*, inclosure. It signifies, in general, one's encroachment upon another's lands, by taking possession of them, and inclosing the same with his own. But here it particularly denotes the vassal's usurpation upon the superior's lands, by taking possession, labouring or inclosing them as his own, or otherwise encroaching thereon: this is esteemed such high insolence and ingratitude in the vassal, that he thereby forfeits to the superior all the lands he holds of him; tho', in other cases, such encroachments are only civilly redressed, by a brieve of perambulation, or process of molestation. Purprision is committed, by encroaching upon the superior's lands, tho' burthened with common pasturage to others, whereby he has little benefit from the lands; as appears from the case of the king's common muirs, the labouring or imparking whereof is declared purprision^e; because the property remains still with the heritor, subject to the servitude, as in these common muirs it does with

26. Purpresture or purprision, committed by encroaching on the superior's lands, even tho' subject in common pasturage to others.

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the king. Therefore, if those who have the servitude of common pasture on their superior's grounds, shall appropriate part of the same, by labouring or inclosing it, they are liable to the penalty of purpersion.

27. What facts infer purpersion.

THE danger of purpersion cannot be incurred, unless the fact is done of certain knowledge, by the vassal himself, or his express order, and that the marches are uncontroverted, for otherwise a probable ignorance will excuse him.

28. Committed likewise against the king, by encroaching on the high-ways.

PURPRESTURE or Purpersion is undoubtedly committed against the king, by any of his subjects encroaching upon the crown lands; but it is likewise that crime, to build upon, stop up, or encroach on the king's high-ways, or the public streets of royal borows, or to obstruct or divert the course of public rivers^a. All those are the king's property, and consequently it is this crime to intrench upon them; and the offender's whole lands, holden of the crown, recognise to the king, as in the case of purpersion by any other vassal against his superior^b.

^a Reg. maj. lib. 2. c. 74.

^b P. 1600. c. 5.

29. How antiently, and at present, cognoscible.

ANTIENLY, barons had power of holding courts of purpersion, in relation to encroachments that concerned themselves, their vassals or sub-vassals, but none under a baron had that jurisdiction^c. The cognition was by way of inquest, *Coram paribus curiæ*, i. e. by a jury of the members of court, as all controversies between vassals among themselves, or them and their superior, were tried of old; but now it must proceed by way of declarator, before the court of session, as in the case of other casualties that require declarator.

^c P. 1477. c. 79.

30. Common encroachments, by one heritor on another's ground, improperly termed Purpersion.

THE encroachment by one heritor upon another's ground, is termed, in our old law-books, and by some of our lawiers, a species of Purpersion^d; but, improperly, that being a feudal delinquency, peculiar to the encroachments by the vassal on his superior's grounds; whereas common encroachments were regulated by the *Actio finium regundorum* with the Romans^e, among whom the feudal holding was unknown: and they are determined with us, before the sheriff or steward of the bounds, either upon a brieve of perambulation, or summons of molestation, by way of inquest^f, which is commonly called a Cognition of Marches. This form of procedure is the same as directed in our old law-books, above referred to, and which probably is founded thereon.

^d Reg. maj. lib. 2. c. 74. § fin. Skeen. verb. (purpresture)
^e Tit. ff. de cod. fin. regund.

^f P. 1579. c. 79. P. 1587. c. 42.

31. Recognition, specially so termed, took only place in ward fees, inferred by the vassal's alienating the major part, or more than the half of the fee.

THE foresaid delinquencies, whereby the fee recognosces or returns to the superior, are common to all manner of holdings, as I just took notice; but Recognition, specially so termed, was peculiar to feudes of ward-tenure, which, tho' of antient standing with us^g, is now taken away by the late statute^h. But, as this kind of holding, with other casualties thereof, hath been already discussed, so this of Recognition must be treated of, that the course of our law, and alteration of the same, by the aforesaid act, may appear; and likewise, in respect that cases, prior to the 25th March 1748, must be regulated by our former law. Recognition was, "when the vassal alienated more than the half of his ward-fee, holding of the same superior,

^g Stat. Dav. II. c. 34.
^h 20 Geo. II.

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“perior, without his consent,” in which case the whole recognised and returned to the superior. The reason why this held only in ward-fees is ; because they were originally granted for military service, as a fund of subsistence to the vassal, when he attended his superior in the wars ; and when he made such alienation, it was presumed the vassal was no longer capable to perform that service, and therefore it was thought reasonable the fee should return wholly to the superior, that he might thereby get another vassal who should undergo it.

RIGHTS granted within the half, or equal to it, were in the mean time good ; but if, by posterior alienations, the half was exceeded, the lands first alienated likewise recognised, unless they were confirmed by the superior before the subsequent alienations ; so that, in effect, the validity of the former right was still pendent. The alienation was only by investment taken on the right ; because, till then, the fee still remained in the vassal's person : there was no difference whether the value of more than the half was exceeded by absolute alienations, or by investments of wadset, liferent or annualrent^a ; but if those were purged, or if the vassal was retroceded before declarator was insisted in, the recognition did not take place. If the investment, granted by the ward-vassal, was intrinsically void for want of an essential solemnity, recognition was not incurred ; because truly the vassal was not thereby denuded. But if the investment was only defective thro' want of an additional statutory solemnity, recognition did follow : thus, tho' the seisin was not registered as the law directs, recognition was inferred ; for, by it, truly the granter is denuded, tho' the acquirer's right may be rendered invalid, by the vassal's granting another investment duly recorded. Seisin to be holden of the superior before his confirmation inferred recognition ; because, tho' the seisin is null till confirmation, yet, by the seisin, which is symbolical delivery of the subject, the vassal had done all that was in his power to withdraw himself from the superior ; nor needed there any new right from the vassal to divest him^b.

32. By what deeds recognition inferred.

^a Marcus (recognition) March 1683. earl of Aberdeen. id. June 1687. Littleiden.

^b Feb. 5. 1663. Carnegie.

^c P. 1457. c. 71. P. 1503. c. 91.

^d Jan. 7. 1676. Cockburn. Feb. 12. 1674. viscount of Kilsyth.

^e Feb. 5. 1663. Carnegie.

^f July 20. 1669. Barclay.

ALIENATIONS in feu-farm likewise inferred recognition ; unless they were granted while they were allowed by statute^c, or a feu-duty was reserved equal to the half of the yearly value of the feu. Such feu alienations, granted during the usurpation, when they were allowed, were thereafter made subject to recognition, unless the purchaser applied for confirmation, after the king's restoration ; for that inferred contempt, tho' there was none at first^d. Alienations by minors, which are not intrinsically null, but only reducible on minority and lesion, fell under recognition, because minority does not excuse from delinquencies^e. Investment, taken while the granter was on death-bed, did infer recognition, if the warrant was delivered in *liege poustee*, or while the party was in health, but otherwise not ; because then it is reducible by the heir on that head^f.

33. How far alienations in feu-farm inferred recognition.

IF one held divers tenements ward of the same superior, the alienation of the major part of each was to be considered : but if they were all united by a clause of union, then the major part of the whole behoved to be alienated base, to infer recognition of any one of them ; because

34. What if the vassal held divers ward-fees of the same superior.

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because then they were to be considered as one tenement, tho' lying discontiguous ^a.

35. How far recognition implied in the crime of treason.

FORFEITURE of the king's immediate ward-vassal, for high treason, implied recognition, and so cut off all subaltern rights granted by him, not consented to by the king ^b; but that being an effect of the treason, was remedied by our statute ^c, after the revolution; and we shall enquire hereafter how far the case is altered by the act of the seventh of queen Anne ^d.

^a Harc. (recognition) March 1683. Hay.

^b Jan. 12. 1677. Marq. of Huntly.

^c P. 1690.

^d 33.

^d B. 3. tit. 3.

36. Recognition, and the other feudal delinquencies, must be declared in a proper action, in order to their having effect.

RECOGNITION (as that of disclamation, and purprifion likewise) was made effectual by declarator, which being obtained, the fee returned to the superior, in the same manner as it proceeded from him, subject only to the burthens to which he consented. Rights, established by the positive prescription, were secure against the effect of recognition; but all other rights, or deeds granted by the vassal, not confirmed by the superior, fell. Adjudications led against the vassal, after recognition was incurred by alienation of the major part, fell, in consequence, with the vassal's right: and tho' they were made effectual by infeftment, in obedience to a charge, before declarator, they would not subsist; because the diligence could only carry the right as it stood in the debtor's person, subject to the forfeiture already incurred, and the superior's charter to an adjudger in obedience is always *salvo jure cujuslibet et suo*.

37. Inhibitions not prejudiced by recognition.

By special statute, inhibitions are not prejudiced by recognition ^e; so that the inhibitor may not only insist to make his debt effectual against the receiver of the subsequent alienations, but likewise against the superior, if he takes the benefit of this casualty, which, before the statute, the creditor could not do. This act is still of use, notwithstanding the abolition of ward-holdings, in respect to disclamation, purpresture, and the irritancy of the feu-right, *ob non solutum canonem*; for all these come under the general denomination of recognition, and so fall under the purview of the statute.

^e P. 1686. c. 15.

38. Who must be called in a declarator of recognition; it lies against minors.

IN the action of declarator of all recognitions, as well as in that specially so termed, the vassal, and others whose infeftments in the lands are on record, must be called. As to the king's vassals, the gift is a sufficient title, unless another superior is vouched; because the king is superior paramount of all lands in Scotland: in others the pursuer must produce his title to the superiority, and, if he is a singular successor, his right by progress must be produced. The deeds inferring the recognition must be particularised in the gift from the crown, that it may not be esteemed surreptitious. The donatary, for the most part, infefts himself before he insists in the declarator; but the action will be sustained upon the simple gift. The declarator may be insisted in after the death of the vassal who commits the deed; because, tho' recognition is a delinquency, yet it is inferred, from the condition implied in the nature of the vassal's right, that if he incur such feudal delinquency, the fee shall become void, and return to the superior. The action is competent against minors; for the maxim, *Minor non tenetur placitare super hæreditate paterna*, take no place against

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^a Feb. 17.
1671. Gor-
don. Jan.
28. 1681.
Eldan. Feb.
19. 1662.
Carnegie.
^b July 29.
1672. lord
Hatton.

gainst the superior's interest ^a, nor saves against the predecessor's delinquencies,

It is a good defence against recognition, that the vassal, at the time of the deeds inferring it, was drunk to stupidity, or otherwise disabled from consenting ^b. The vassal's being under inhibition would not have prevented the effect of recognition, but only saved to the inhibitor his diligence. But if the vassal was interdicted, the alienation, without consent of the interdicters, is void, and so could not infer recognition. And it should seem, that neither can any other feudal delinquency, committed by such person, or omissions by him, subject the feude to a forfeiture: and indeed it is the opinion of the learned Craig, that a person interdicted can do nothing that may evict the feude ^c.

^c L. 1. dieg.
12. § 32.

If the right under challenge was secured by the positive prescription, the defence was no doubt good; but it might be conjoined with subsequent deeds to make up the major part, in order to infer recognition of the other parts of the estate; provided those alienations were made before the positive prescription of the part, claimed to be brought *in computo*, was run ^d.

^d July 25.
1712. Mon-
crief. Fount.
3 Feb. 1686.
Dundee.

DEEDS of alienation, by ancestors and heirs, were conjoined to infer recognition: thus, if the predecessor had granted some deeds, whereby less than the half was aliened, they would be conjoined with deeds by the heir, to make up the major part: for an infeftment on retours, by precepts of seisin out of the chancery, or in obedience to charges, to receive the vassal, did not secure against recognition ^e; because it does not import the superior's consent to the sub-feus, of which he is presumed ignorant; and where they grant precepts of seisin, in obedience to charges for that purpose, it is no voluntary act of theirs.

^e July 19.
1664. hospi-
tal of Glas-
gow. June
24. 1668.
Gray.

39. How far
drunkenness
excuses in re-
cognition;
is inhibition
or interdicti-
on a bar to
it.

40. A right
secured by
the positive
prescription,
how far com-
puted to in-
fer recogni-
on.

41. Deeds of
predecessors
and heirs; of
authors and
singular suc-
cessors, con-
joined, to in-
fer it; how,
in the case of
singular suc-
cessors, such
conjunction
prevented or
excluded.

AND, for the same reason, the deeds of authors in some cases were conjoined with those of singular successors: for example, one granted sub-feus within the half of the barony, and thereafter disposed the whole barony, and the disponent was infeft on a charter of resignation, or confirmation from the crown, and granted more sub-feus, whereby the half was exceeded, recognition was thereby incurred; unless the disposition of the barony bore expressly such parts of it to be granted in sub-feu, whereof the superiority was conveyed; for otherwise the superior's consent to them could not be inferred, since there was no mention of them in the right whereon the charter passed ^f. But if such charter contained a clause of *novodamus*, it would have excluded recognition by any former deeds; nor did those come *in computo*, in order to be conjoined with subsequent alienations to infer recognition; because such clause has the effect of an original right, and thereby the superior passes from all claim of property in the estate of the vassal who granted the sub-feus, and is virtually a confirmation of them. Or if the subject-superior granted voluntary precepts of *clare constat* to the heirs, or charters of resignation or confirmation to the singular successors, tho' without a *novodamus*, the recognition would have been excluded as to prior deeds; for subjects are presumed to advert

^f July 1.
1681. Hay.

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to their own interest, and to enquire into the circumstances, in relation to the vassal's fee, before they receive him; whereas charters of resignation, and confirmation of lands holden of the crown, pass of course in exchequer^a.

^a July 17.
1672. lord
Hatton.

42. The effect of a charter of confirmation, or resignation, as to excluding recognition.

THERE is no doubt, but a confirmation of base rights by the crown, or other superior, would have saved them against the effect of recognition incurred by other deeds of alienation; but, if the major part was alienated before confirmation, the right confirmed would be computed to make the rest recognise^b; because the superior's consent was only to secure the right confirmed, but not to pass from the casualty already fallen. The case is different, as to a charter of resignation from the crown; for, if recognition was incurred before the date of the charter, and the casualty gifted before infeftment on such charter, the lands therein contained fell under the recognition^c; for, at the date of the gift, these lands belonged to the vassal, who had incurred recognition, and who could only be denuded by infeftment on the charter; and the declarator is drawn back to the date of the gift. But where a part of a barony is disposed, to be holden by a public infeftment, infeftment, taken base upon the disposition, becomes a public infeftment, and a separate tenement, by the superior's confirmation, and is dismembred from the barony; so that, in such case, only the deeds of the acquirer, or his heirs, and not those of his author, can be regarded in a question about recognition of such part. If base infeftments are confirmed by the superior, to be still holden of the disponent, they could not be conjoined with subsequent base rights, to make up an alienation of the major part, and so to infer recognition; for, after confirmation, they are computed only, so as not to prevent recognition already incurred, but when confirmed, they are deemed as alienations with the superior's consent, and so cannot be brought into the account, to infer a subsequent recognition^d. And the case is the same as to charters of resignation, after infeftment follows on them. Therefore the previous, concomitant, or subsequent consent of the superior to the deeds of alienation, would have saved them from falling under recognition: but, as to subsequent consent, deeds confirmed were still considered as a ground of recognition of the rest of the estate, if, by conjoining them with the other alienations, before confirmation, the major part was exceeded, but could not be conjoined with alienations subsequent to the confirmation to that effect.

^b Newt. decif.
53.

^c Newt. decif.
59, 60.

^d D. decif.
July 7. 1681.
Hay. Newt.
decif. 59.

43. How the superior's homologation of the sub-feu saved it from the effect of recognition.

SUBSEQUENT consent, which took off recognition, was likewise inferred from the superior's homologation of the vassal's right, as by granting a precept of *clare constat* in favour of the heir; but a precept of seisin, granted in obedience to charges on precepts, issued upon a retour, will not exclude recognition by the predecessor's deeds^e, as I took notice above.

^e June 24.
1668. Gray.

44. Probable ignorance of the nature of the holding, from its doubtful conception, save

PROBABLE ignorance in the vassal, of the manner of holding, would have excused him from incurring recognition; for, this casualty being founded on the vassal's contempt, he could not be guilty of it, unless he certainly knew it to be a ward-fee: thus, if it bore annual payment of a sum of money, with Services used and wont, the law

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law did construe it a ward-fee; but the vassal had reason to doubt, because it resembles a feu-right. But a taxward-holding did not afford the defence of probable ignorance, for there it is plainly acknowledged to be a ward-fee, and the taxing some of the casualties could not exclude the effect of others^a.

^a Feb. 5.
1663. Carnegie.

^b July 15.
1674. Erskine.
^c July 29.
1672. lord Halkerton.

^d Feb. 14.
1678. Arbuthnot.

^e Falc. Feb. 2.
1683. Buchanan.

^f P. 1597.
c. 250.

A RIGHT by the vassal, of the whole fee, to his eldest son, would not have inferred recognition; for there is no change of the vassal, the eldest son being, *Alioqui successurus*, necessarily presumptive heir in the subject: but, if the son alienated to others more than the half, and these deeds were not purged in the father's life, recognition would have taken place^b. A right to one's brother, tho' the granter wanted heirs of his body, was not exempted from recognition, for a brother is never *alioqui successurus*, or presumptive heir^c. Infeftment on a disposition, with a proviso to become void in case of heirs of the granter's body, did infer recognition; because the vassal is presently denuded of the fee, which is thereafter to return to him, if the resolute condition exist, by the supervening heirs of his body^d.

A RIGHT, bearing a condition, "that it should only be valid if the superior consented," would have been subject to recognition; for the vassal needs no new deed to denude him, and it is in the same case as rights granted to be holden of the superior; therefore, in both cases, those rights inferred recognition, if infeftment was taken upon them before the superior's confirmation or consent. But if, by a clause in the right, infeftment was expressly suspended "till the superior's consent were obtained," in such case, tho' seisin should notwithstanding follow without the superior's consent, it could not subject the granter to any hazard, for the seisin is without his warrant. The donatary to the casualty of recognition was excluded, by a personal exception, from computing base infeftments granted to himself, in order to infer alienation of the major part, whereby recognition was incurred^e.

AFTER 25th March 1748, no deeds of alienation by the vassal can infer recognition, strictly so called, which took place in ward-holdings only, such tenure being abolished and converted to blench, as to lands holden ward of the crown, and to feu, as to such holden of subjects. But where recognition had fallen by alienations base, before that time, a declarator of the same may still be insisted in; nor is the vassal in such rights secure, till either the course of the long prescription is run, or the superior's confirmation be obtained; and therefore I have fully stated the several cases wherein it is incurred, which may likewise serve to explain other parts of our law.

IN holdings in feu-farm, if the vassal neglect payment of the feuduty for two years together, the feu becomes void by statute^f, and recognosces and returns to the superior; but this being only an offence of omission, and a penal irritancy, it is purgeable at the bar, in a suit at the superior's instance for declaring it. This feudal holding being introduced into our law, by the statutes allowing vassals to set their lands in feu-farm; and thereafter the irritancy being enacted by special statute, such provision of the law may be discharged and renounced in the original feu-charter, which will hold good even against

from recognition.

45. A base right from one to his eldest son inferred it not, unless the son alienated more than the half: but to his brother it did.

46. A condition in the right, that it should only be valid, if the superior consented, secured not against recognition; but otherwise, if seisin was suspended till the superior consented.

47. Recognition cannot be incurred, by alienations, after 25. March 1748.

48. A forfeiture of the fee to the superior, *Ob non solutum canonem*, peculiar to holdings in feu-farm; a conventional provision added to the legal, hinders

not purging
the irritancy
at the bar.

gainst the onerous singular successors in the superiority, as being a quality of the right^a, and the discharge of a casualty not incident naturally to the holding. It has been thought, by some of our lawiers, that if, besides the provision of law, the charter bear expressly the irritancy, it cannot be purged before declarator^b. But that distinction is without foundation in the statute, which makes the case equivalent, by the provision of law, to an express provision in the charter, and so the conventional provision cannot be of higher import, and accordingly the irritancy is always purgeable without distinction. Indeed, in a provisional irritancy, contained in the charter, it was once found, that a term should not be allowed for purging, and that the vassal is liable in the expence of the action^c. As to the costs of suit, it is most just the same should be allowed, even in the case of the legal irritancy. And as to allowing a short time for producing the money, to satisfy the feu-duty in arrear, it is wholly at the arbitrement of the court, in the one case and the other; and which at present, I conceive, would not be refused, in order to prevent the irritancy of the party's right. Since the irritancy can be excluded by payment at the bar, then a liquid ground of compensation must likewise be received, for that is equal to payment.

^a Feb. 10.
1749. Mac-
Vicar.

^b Sir George
Mackenzie's
inst. lib. 2.
tit. 5.

^c Feb. 18.
1680. Earl
Marr.

SECTION III. *The Superior's Remedies, to prevent the Change of his Vassal.*

49. The preference of the superior, in case of the sale of the subject, by the civil law in Emphyteusis, and by our ancient law, takes no place at present.

THERE was, by the civil law, in the case of lands given in *Emphyteusis*, a privilege competent to the lord over the subject holden of him, that if the tenant or *Emphyteuta* was disposed to sell it, he behaved to make the first offer to the lord^d. There is some resemblance of this in our old law-books, whereby the superior is declared preferable to all others in the purchase of lands holden of him^e; but we have nothing of this in our law at present: the vassal may dispose of his lands at pleasure, to whom he thinks fit; especially since, ward-tenure being abolished, there is no danger of incurring recognition by such alienation.

^d L. 3. c. de
jure emphyt.

^e Leg. burg.
c. 100.

50. The effect of a proviso in a charter, requiring the superior's consent to the alienation of the fee, or obliging the vassal to make him the first offer.

BUT there frequently occurs a proviso in the vassal's charter, that alienation made of the lands without the superior's consent, or making the first offer to him, shall be void, and the lands return to him. If such clause was engrossed in the precept of seisin; and accordingly, in the seisin duly registred, it was effectual against singular successors, but otherwise only good against the vassal, and his representatives and gratuitous successors, for damages, if it was contraveened^f. Such preference of the superior, which in the law is called *Jus pre-timēseus*, was an incumbrance upon the property, and by no means inherent to feudal rights, and therefore most unfavourable, and could not affect the subject, without being engrossed, as above, and so standing on record in the seisin. And now, by the oft mentioned late act^g, all such prohibitory clauses in charters and infeftments, restraining the power of alienation, are taken away and discharged, together with ward-tenure, in which it was implied by law so far as exceeded the half of the subject.

^f Jan.
1728. Gall of
Kinloch.

^g 20 Geo. II.

THERE

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THERE is another kind of preference given by our law to superiors, that when they are charged to receive adjudgers, they may take the lands and pay the debt, which is termed *Retrañtus feudalís*. This takes no place in lands holden of the crown, and consequently neither in burgage tenements, whereof the king is properly the superior: nor can it be used against purchasers at a roup, before the lords of session, tho' such are adjudgers, and, by the express terms of the statute 1681, liable in a year's rent for their entry, but to no other inconveniency^a. I shall treat more fully upon this privilege in another place^b, as I touched upon it a little before^c.

^a Decem. 17. 1695. Kennedy, observ. by Fount.

^b B. 3. tit. 2.
^c Sup. tit. 4.

Observations on the Law of England, in relation to the Premises.

I SHALL only touch here upon the divers ways that estates in lands are lost in civil cases: for, as to forfeiture on criminal accounts, I am to discourse of the same in the next book^a.

^a Tit. 3.

By the law of England, in some cases, alienation by a tenant infers a forfeiture of his estate to the person interested, whom he intended to wrong. This may happen either out of a court of record, or in a court of record: the first is, where a particular tenant, *viz.* a lessee for life, tenant in tail, after possibility of issue extinct, tenant for years, by statute merchant or staple, or *elegit*, alien, by livery in fee, or make any other greater estate than they lawfully can, this infers a forfeiture of their estates^b.

^b Coke 1. inst. 251, 252.

In a court of record, alienation infers a forfeiture, as in levying a fine, or suffering a common recovery of lands, or affirming the remainder or reversion to be in a stranger: thus, where a stranger supposes in any action the reversion to be in himself, and the tenant for life confesses the action, this infers a forfeiture of his estate. Where there is a forfeiture, by alienation of the particular tenant, estates by him lawfully made, and mean charges within his power, shall not be avoided^c.

^c Coke 1. inst. 234.

SUCH alienation, by our law, infers no forfeiture of the party's right, except in the case of alienation of the major part in ward-fees formerly; and as to particular estates, those Lessees, whom we call *Kindly Tenants*, *i. e.* such as, on payment of a grassum or stated fine, are received lessees for life, in the possession of their ancestors, forfeit their right, by alienation of their lease, or even more than the half thereof, but no other lessee loses his right by such alienation.

2. A FORFEITURE of lands to the lord is likewise inferred, by alienation in Mortmain, of which I have already discoursed^d.

^d Sup. tit. 3.

3. By non-performance of a condition, lands may be forfeited or lost. Of estates upon condition, I have likewise treated in the fore-cited place.

^e 5 and 6 Ed. I. c. 5. Coke 1. inst. 54.

4. THE party convicted of waste, in any lands of which he has a lease, or an estate for life, forfeits the place wasted, and thrice as much as the waste is taxed at^e. None shall recover in an action of

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waste,

51. The superior's option to take the lands and pay the debts, called *Retrañtus feudalís*.

1. Forfeitures only in civil cases here taken notice of.

2. A tenant for life, or other particular tenant, forfeits his estate, by making any other estate than what he lawfully can.

3. How does such tenant forfeit his estate, by alienation in a court of record: estates made by such tenant, within his power, stand, notwithstanding his forfeiture.

4. Forfeiture inferred by alienation in Mortmain.

5. And by non-performance of a condition.

6. Forfeiture on committing of waste.

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waste, where it is of small value, as under 3 s. and 4 d. I have spoken of waste elsewhere ^a.

^a Sup. tit. 9.

7. Lands may be lost by bankruptcy. The commissioners may sell all the lands the bankrupt was possessed of, at the time of his becoming such.

5. LANDS may be lost by bankruptcy, on a commission of bankrupt; the assigns to the bankrupt's estate appointed by the commissioners, may sell all the bankrupt's lands in his possession, at the time of his becoming such, or which thereafter accrue to him, whether in fee-simple, fee-tail, for life or years, freehold or copyhold, towards payment of his debts. Their sale of the entailed lands shall be good against the bankrupt and his issue, and all in remainder or reversion, if the bankrupt could have cut off such estate by common recovery, or otherwise by any act whatsoever ^b. I have taken notice of the case of bankrupts in another place ^c, and shall more fully hereafter ^d.

^b 5 Geo. II. c. 30.
^c B. 1. tit. 10.
^d B. 4. tit. cessio bonorum.

8. Lands escheat to the lord, when the tenant dies without heirs, and by corruption of his blood, on attainder of felony.

6. LANDS may be lost by escheat. Thus, where the tenant dies without heirs, the lord of whom they are holden shall have them by escheat ^e. Thus likewise, by corruption of blood in felony, the land of the tenant attainted falls to the lord, because the estate cannot descend, and in treason the forfeiture goes to the king. With us, in felony, there is no corruption of blood consequent upon it, and the only forfeiture is of movables, which fall in such case to the king. The same corruption of blood, and forfeiture in treason, takes place here, as in England, by the late act ^f. The privilege of last heir belongs to the king, as shall be shown in the proper place ^g.

^e Coke 1. inst. 13.

^f 7 Ann. 8 B. 3. tit. 3.

9. Lands may be lost by disseisin, abatement and intrusion.

AGAIN, lands may be lost by Disseisin, Abatement and Intrusion. A disseisin is, "the wrongfully putting out of him that is actually seised of the freehold." An abatement is, where "a man dies seised of an estate of inheritance, and between his death, and the entry of his heir, a stranger doth enter." Intrusion is, "when, between the death of the tenant for life, and the entry of the heir, a stranger intrudes ^h." In those cases the party aggrieved may be repossessed, and recover double damages and costs.

^h Coke 1. inst. 154, 277.

SUCH wrongful taking possession of other mens estates, or of estates possessed by others, whether as their property, or upon leases, is by our law severely punishable, and never divests the true proprietor, but subjects the offender only to the highest damages, which we call violent profits, besides costs of suit.

10. How far resignation, or surrender of estates, extinguishes the same.

WITH us an ordinary extinction of the vassal's fee, is by resignation or surrender thereof in the superior's hands, *ad remanentiam*, duly recorded, for that infers a consolidation of the same with the superiority: but, by the law of England, surrenders cannot be made of estates in fee-simple or fee-tail. Surrenders are only made of estates for life or years, of lands and tenements, whereby the tenant yields up the estate to him that has the immediate estate in remainder or reversion, that he may have the present possession: by this the estate for life or years drowns by mutual agreement ⁱ. A surrender may likewise be made of copyhold or customary estates, of which I have already spoken ^k. With us, surrender of leases is not accustomed; a discharge

ⁱ Coke 1. inst. 377.
^k Sup. tit. 3.

discharge of the same is sufficient, for thereby the proprietor is freed of such lease, and is intitled to attain the possession.

Two fees-simple that may stand in several persons distinct, cannot do so when they meet in one person, but the greater and absolute fee shall swallow up the base and limited fee, which is thereby said to be Merged or drowned: thus, if one who is seised in fee of a manour, out of which a rent was issuing to another, purchase the rent, or if he who hath the rent purchase the manour, and takes the conveyance to himself in fee, by this the rent is merged in the inheritance^a. Which would likewise hold with us in the like case.

^a Vin. (merger) p. 393.

11. Two fees-simple cannot stand in the same person; merger of estates.

If a man have a rent-charge, issuing out of certain lands, and purchase any parcel of the lands to him and his heirs, all the rent-charge is extinct^b; for one cannot hold part of the lands out of which a rent-charge is paid, and, at the same time, have the rent-charge; because the rent-charge is entire, issuing out of every part of the lands, and cannot be severed or apportioned. But I conceive, that, with us, if one purchased part of the lands, on which he has an annual rent constituted, he would be intitled to a proportion out of the other lands, conform to their respective rents.

^b Coke 1. inst. 139.

12. If one purchase part of the lands, out of which a rent-charge is paid, the whole rent-charge is extinct.

T I T. XII.

Prescription.

IN this second book, indeed, matters concerning real rights fall only to be discoursed upon. But we shall treat here of Prescription at large, both as to personal and real rights, for connection's sake; and likewise of interruption relating to both. And prescriptions being of various kinds, and some having different effects from those of others, I shall discourse of them severally, and of interruption of the same, in the following sections.

SECTION I. *The Positive Prescription.*

RIGHTS are both acquired and lost by prescription: the first is termed the Positive, and the other the Negative Prescription. In the civil law, prescription is only meant of obligations^a, and applicable to the negative prescription alone; and usucapion is used for the acquisition of property by long possession, from *usucapere*, i. e. to acquire by use or possession^b. But we use the term Prescription for both, and the regular time for perfecting it is forty years, and which is always the rule, unless a shorter time is established by statutes in particular instances. And this likewise is the case in the canon law, where the term is understood of the positive prescription as well as the negative, and requires forty years to its completion against the church^c, which last was also the rule in the civil law in such case^d.

^a Tit. cod. de presc. 30 vel 40 annor.

^b Tit. inst. et ff. de usucap.

^c Cap. 8. ext. de prescript.

^d Novel. 131. c. 6.

^e P. 1617. c. 12.

THE positive prescription is, "when a right of heritage, or of moveables, of whatever kind or species of them, is acquired by the uninterrupted possession thereof for the space of 40 years^e." The statute which introduces this prescription mentions only Heritage; but the property

1. Prescription, either positive or negative, both require 40 years to complete them; the first concerns both movables and lands; the length of time no hardship, in the case of prescription of movables, with us.

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property of moveables is governed by the same rule, as to this case of prescription by analogy from the statute; because it were absurd, that a longer time should be required, and there is no place for a shorter, without a particular statute. And it is thought, that the words in the later part of the statute, *viz.* "that actions on all grounds whatsoever shall prescribe, unless sued within forty years," may be understood to extend to claims of moveables, that the same may be cut off after that period. It may seem, that prescription of moveables ought to proceed in a much shorter time; and indeed, by the civil law, at first one year, and thereafter three years was declared sufficient to acquire moveables by usucapion^a. But with us there can happen no inconveniency from the length of time required to the prescription of moveables, for instantly the peaceable possession of them presumes a property; so that the party who claims them must instruct how he lost the possession, otherwise than by transmitting the property; nor is there any title in writing necessary by our law to moveables, and consequently none can be required to the prescription of them^b.

^a Tit. inst. de usucap. in princip.

^b Feb. 11. 1712. Boyd.

2. The regular legal title in prescription of heritage, either as to heirs or singular successors.

In heritage, there must be a legal title in writing, competent to transmit the subject, or constitute the right, for prescription only supplies the want of a right in the author, who, in the case of prescription, is supposed to be *non dominus*, one that hath no right to the subject. Therefore a purchaser, in order to acquire lands by prescription, regularly must have for a title a feisin, and its warrant, with forty years continued possession thereon^c: this is the case as to rights of lands, or other particulars that require infeftments to their completion. But in rights that are constituted without infeftment, as tacks, heritable offices, or the like, the positive prescription must proceed on the ordinary title thereto, the prescription supplying the want of right in the granter only; and it were absurd to require feisin as a title of prescription, where there is place for none in the constitution of the right.

^c Jan. 21. 1679. Fraser. P. 1617. c. 12.

BUT, in the case of heirs, a feisin, proceeding on retours, or precepts of *clare constat*, is sufficient to found prescription, without the precepts, which are the immediate warrants of the feisin. In such case, those warrants are presumed, after 40 years possession as heir; and tho' feisin was taken on the precept of *clare constat*, after the granter's death, whereby the precept fell, yet such objection was found not receivable after the positive prescription was run; for indeed there was no necessity for producing the precept at all in such case^d. The interest of the heir in the subject gave occasion for making this difference, between the prescription upon the title of heir, and other prescriptions upon singular titles. And, in some countries, the character of heir is regarded so far, that the heir needs no feisin at all to perfect his right: thus, the maxim in France is, *Le mort saisit le vif*, the predecessor's feisin or possession is sufficient to vest the heir with the right.

^d Hume (prescription) Nov. 9. 1729. Purdie.

3. The title of prescription requisite to singular successors in

In burgage-lands, singular successors are received by resignation made in the hands of one of the bailties of the borow, who instantly gives feisin to the person in whose favour it is made, and one instrument, containing both resignation and feisin, is extended thereon, and attested

a P. 1567.
c. 27.

b Decem. 25.
1705. Ker.

c A&S fed.
Feb. 11.
1708.

d Dec. 25.
1705. Ker.

e P. 1594.
c. 218.

f P. 1669.
c. 3.

attested by the town-clerk, in virtue of his office, as notary ^a. For this reason, such instrument, with the disposition whereon it is founded, is sufficient evidence that the resignation and feisin were warrantable, without either procuratory of resignation, or explicit precept of feisin, and consequently is a good title for prescription ^b. But such instruments are null where the resignation does not proceed by the proper symbol of Staff or Bastion, but by that of earth and stone, which was an absurd custom, and is therefore justly condemned by the court of session in all time thereafter, on pain of nullity ^c.

FARTHER, in those holdings, heirs are received upon summary cognition before the baillies, and therefore an instrument of feisin, (commonly called by Hasp and Staple) bearing such cognition to have been taken, and thereupon feisin given by the baillie of the borow, in favour of the heir, is sufficient to make up the heir's title to those lands: and consequently it is equivalent to feisin on retours, or precepts of *clare constat*; because truly it is feisin given by the baillie, on his proper knowledge of the heir's propinquity, in the same manner as if it did proceed on a precept of *clare*. For this reason such feisin is justly sustained, as on a precept of *clare constat*, to found prescription ^d; and indeed, even before prescription is completed, it is a title to the lands equal to a precept of *clare constat*, and feisin thereon.

OF old, procuratories of resignation were commonly by writings apart, and likewise precepts of feisin relating to charters; wherefore it was justly provided, that, after the course of 40 years possession, it should not be necessary to produce such procuratories and instruments of resignation, or precepts of *clare constat*, or other precepts of feisin, where the charters to which they relate, and the instruments of feisin making mention of the precepts, are still extant ^e; so that the want of these is no ground for reducing the right, and, by the same rule, the positive prescription, afterwards introduced, may proceed without them. Tho', after 40 years possession, such procuratories, or instruments of resignation aforesaid, are not necessary to the title of prescription; yet the feisin (except in the case of heirs, as aforesaid) must be supported, either by the precept its immediate warrant, or by the charter or disposition, which is the radical right, and the remoter warrant of the feisin; for otherwise it is but the bare assertion of the notary. Indeed a feisin, *propriis manibus*, duly subscribed by the granter of the right, is sufficiently thereby warranted, and consequently is a good title of prescription, but otherwise it must be supported by the deed to which it relates.

THE above statute can only concern an instrument of resignation *in favorem*, which is no more than a previous step, in order to enable the superior to grant the charter, as appears from the purview of the statute, which requires that the charter, referring to such instrument, be still extant. But an instrument of resignation *ad remanentiam*, is the completion of the right of fee in the superior's person, which therefore must still be produced in evidence thereof, so as to exclude the subsequent deeds of the resigner. And as this is founded in the terms of the statute and nature of the thing, so it is farther evident from the act ordaining such instruments to be recorded ^f, which

burgage-tenements.

4. In such lands, infestment by hasp and staple a sufficient title of prescription to heirs therein.

5. Procuratories, and instruments of resignation, or precepts of feisin, not necessary to be kept after 40 years, and consequently prescription may proceed without them.

6. How far instruments of resignation *ad remanentiam*, necessary to be produced after 40 years; or to make good the positive prescription.

therefore must still be preserved. But if the superior hath possessed 40 years after such resignation, his right to the full property is perfected upon his own infestment in the lands, so that, in such case, tho' the instrument of resignation be lost, he is in no danger.

7. In the positive prescription, the possession must be continued by the person himself, or others on his account, or by rights flowing from him; the heir's possession, tho' dying unentred, computed in the course of it.

THE possession must be by the person interested in the right, or others in his name, or by rights from him. A wife's liferent-infestment will be validated by the husband's possession who granted it; because, tho' the liferent was not to take place till after his death, and no possession could be upon it till then, yet the husband, possessing as fiar, is in the course of acquiring the right by prescription; and, if it is not completed in his own time, the widow may use the aid of his possession, and thereby perfect the prescription, and acquire the fee to the heir, and establish her own liferent. Prescription must be perfected by 40 years possession, upon seifins one or more, Continued and Standing together: for, as the possession must not be interrupted, so neither must the progress^a; and he who pleads prescription must shew a complete conveyance, as his title.

^a Feb. 15. 1671. Earl of Argyle.

BUT the interveening of apparent heirs who possessed as such, tho' never entered or infest in the subject, will not interrupt the prescription; but their possession, on the contrary, will be computed, in order to perfect the prescription; because the possession of the person deceased is, in this view, continued by his apparent heir, who possesses, as proprietor, the *hereditas jacens*; and the apparent heir's possession is so much regarded now in law, that, if he possesses for three years, his onerous deeds will affect the next heir who passes him by. The possession of adjudgers, wadsetters, liferenters, and others in the right for the time, is conjoined to perfect the prescription, as well as that of predecessors and heirs^b.

^b June 19. 1713. Murray. Edg. July 1724. Earl of Marchmont.

8. The positive prescription extends not only to lands, but likewise to all rights out of them, and privileges depending thereon, or possessed therewith.

THE positive prescription, by the statute, secures all lands, annuallents, and other heritages whatsoever, which is extended, by the court of session, to all privileges that are possessed therewith: thus, the right of a fair, or public market, at a certain time or place, will be acquired by prescription. A tack or liferent will, in like manner, be secured, during their continuance, against all defect of right in the granter, and likewise against the want of consent of the persons, which otherwise is requisite thereto^c. By it a right of tithes may be acquired; for tho' the negative prescription, by non-payment of tithes for 40 years, will not avail to acquire an immunity; yet possession of tithes for the course of 40 years, upon a title of property thereto, will give a perfect right by the positive prescription^d. I have discoursed fully upon the prescription of tithes elsewhere^e. It extends to servitudes and all real burthens^f.

^c Dec. 21. 1679. Farquharson. July 7. 1677. Pearson of Prestonhaugh.

^d Feb. 7. 1666. Earl of Panmuir.

^e Sup. tit. 8. § 8.

^f Feb. 10. 1666. North Leith.

9. Is good against the king, tho' the negative prescription is not; it is good likewise against the church.

THE positive prescription creates an absolute right, and excludes all interest in the king, as well as the subjects. Indeed, in the negative prescription, the negligence of the officers of state cannot prejudice his majesty's interest. But here the deed of the possessor, viz. his continued possession on a proper title, acquires a right by prescription, which the neglect of the officers of the crown cannot affect. On this ground it is, that the right of a fair, ferry-boat or salmon-fishing,

fishing, may be acquired by the positive prescription, proceeding upon infeftments flowing from subjects, tho' these rights are *inter regalia*; for the presumption, after the positive prescription is completed, becomes uncontrollable, or, as lawiers speak, *Præsumptio juris et de jure*, that they were originally derived from the king^a. Prescription will likewise run against the church: thus it was found, that an heritor might prescribe a right to an old glebe of an united parish, notwithstanding he was not specially infeft therein, but only possessed it as part and pertinent of his other lands^b.

^a Decem. 21.
1679. Far-
quharson.
Decem. 22.
1731. Tar-
bet. Jan. 13.
1680. Brown.
^b Edg. June
10. 1724.
Crawford.

THIS prescription cuts off all grounds of preference. Thus, a seisin not registred must yield to another duly registred, as the act of parliament 1617 declares; but the granter being thereby denuded, it will be validated by prescription, against that ground of preference; for the want of registration is not an absolute nullity, the right, tho' unregistred, being declared good against the granter and his heirs. However, from the nature of the thing, where an estate is provided to heirs-male, the prescription cannot run against an extraneous heir-male, so long as the same successive heirs were both heirs-male, and of line, but only after the succession divides; unless there hath been a continued series of retours in favour of the heirs, as heirs of line^c; for, in such case, the title of the heir-male is sopited, and cut off by the positive prescription; or rather the consent of the heirs for the time, to an alteration of the destination, is inferred from such deeds, in the same manner, as if it had been done by an express settlement in favour of heirs of line. The inverting the title of one's possession cannot be objected, after the positive prescription is run, because all parties consent is thereby presumed^d.

^c Marcus
(contract of
marriage)
Nov. 22.
1687. Somer-
vile.

^d Fount.
Decem. 13.
1695. Innes.

^e § 12.
inst. de usu-
cap. l. 24.
cod. de rei
vind.

^f L. 28. ff.
de reg. jur.

BUT no essential defect in the title can be supplied by prescription. Thus, a seisin, or its warrant, that is null for want of essential solemnities, cannot become good by prescription; for the positive prescription, as *Ufucapion*, requires *Justum titulum*^e, a title valid in law, without which it cannot proceed. If the title is void at the commencement, it cannot become good by course of time, the rule being, that *Quod initio vitiosum est, tractu temporis convalescere non potest*^f, what is void at the beginning, cannot, by course of time, become good.

10. It cuts off
all grounds of
preference;
may supply
the want of
registration;
how far good
against an
extraneous
heir-male,
when the suc-
cession di-
vides.

11. An essen-
tial defect in
the title, can-
not be sup-
plied by the
positive pre-
scription.

By express provision in the statute, the prescription does not run against minors, nor against reversers, where the reversion is either incorporated in the body of the right and infeftment, or duly recorded in the register of reversions. One cannot prescribe against the terms of the title of his possession: thus, vassals cannot prescribe an immunity from the *Reddendo* of their charters. Rights mortified to pious uses have not the privilege belonging to minors, because the exception cannot be extended, nor is the reason the same; for the term of minority is certain, whereas the other is infinite; and, if such exception took place, these things would be absolutely exempted from prescription, contrary to the express terms of the statute, which comprehends all kinds of rights not specially excepted. The positive prescription is favourable, tho' the negative, regularly, is not so much favoured. The times of war and pestilence, and surcease of justice,

12. Runs not
against mi-
nors; how
far it extends
to reversions,
or things
mortified;
the times of
war, or sur-
cease of jus-
tice counted;
one cannot
prescribe a-
gainst the
terms of his
title.

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justice, are counted to make it up^a: so that the maxim, that, *Contra non valentem agere, non currit præscriptio*, does not universally hold, to save against the effect of the positive prescription^b, tho' I shall afterwards shew, that, for most part, it does.

^a June 30.
1671. Beid-
man.
^b Decem. 7.
1633. Acher-
der, June 30.
1671. Mag-
dalen Chag-
rell. Dec. 19.
1707. town
of Aberdeen.
^c P. 1617.
c. 13.

13. The pre-
scription of
retours 20
years; how
far things not
in commerce,
or stolen, ca-
pable of pre-
scription.

THE positive prescription of retours runs in 20 years, by expres statute, as likewise the negative^c, as to the liberty to reduce them after that space; tho', if another is not served heir, the true heir's right never prescribes, according to the rule, that *Juri sanguinis nunquam præscribitur*. Things that are not the subject of commerce, cannot be acquired by prescription, since none can be vested in the property of them, nor things stolen or robbed, according to the dictate of the 12 tables, *Rei furtivæ æterna auctoritas esto*; but when the defect is repaired, by the owner's transacting with the thief, or the thing's returning into his possession, it becomes the subject of prescription^d. And it may justly be doubted, if the dictate of the civil law, in this case, takes place with us, since the course of time, among the Romans, was short, whereas, by our law, it is very long, which makes a great disparity.

^d § 2. inst. de
usufructu. l. 4.
§ 6. 12. ff.
cod. tit.

14. The po-
sitive pre-
scription se-
cures not a-
gainst false-
hood of the
titles; but
what if writ-
ings are re-
gistred, and
the principals
cannot be
found, either
when they
are left in
the record,
or when not.

THIS prescription does not secure against reduction on the head of falsehood, which is expressly excepted in the statute, false writings being no deeds, and consequently no title for prescription. Therefore, tho' reduction and improbation is not insisted in, till the long prescription is accomplished, the defender must produce the principals: nor will extracts, tho' out of the general register, be sufficient to stop certification; for the act for registration of seifins, &c.^e expressly declares, that extracts make no faith, where the writing, said to be registred, is offered to be improven. The defender, in such case, to prevent his right's being cut off, must insist in, and repeat, or found on a proving of the tenor of those deeds, till the event of which, certification will be stopt; and, if he prevails in recovering a decree of tenor, he is safe; but otherwise the pretended deeds will be set aside, by the certification against them, as forged. All this is most reasonable, where the principals are given back to the party, who must therefore run the hazard, in not duly keeping them; and, notwithstanding their being recorded, they may have been forged writings.

^e P. 1617.
c. 16.

BUT, in other cases, where the principals are left in the record, as when bonds, &c. are registred, by virtue of a clause of registration, or in the case of the warrants of decrees in the hands of the clerks of courts, the question is, if the loss of those writings should fall on the creditor, or other party interested, who is possessed of the extracts of them, under the hands of the respective clerks? The like question may occur, on whom the damage must fall, if seifins, &c. marked by the clerk, as registred, are not truly booked and insert in the record? For answer to this last difficulty, in the case of seifins, or other writings ordained to be recorded in the register for that purpose, which is purely for intimation, and not for conservation, the principals not being left in the register; tho' these are attested by the clerk as duly recorded, yet, if they are not really booked, and insert in the register, they are of no force against singu-
lar

TIT. XII. The negative Prescription of 40 Years. 165

a P. 1696.
c. 18. Feb.
1745. Daw-
ling.
b Act 19.
P. 1686.

lar successors, reserving action of damages to the parties leased, against the clerks and their representatives, by whose omission or negligence they suffer^a; without prejudice to such as had registred their seilins, and other writings and diligences, conform to the former statute^b; which sustained these writings, as recorded, if they were marked by the clerk to be registred, tho' they were never booked and insert in the record. By the same rule, in other cases, the loss of the principal writings must lie upon the creditor who intrusted them to the register; and not upon the debtor, who has no concern in the matter, having only consented to the registration of them; but still, it is in the creditor's option, whether he shall register them or not, or what competent register he shall commit them to: and the creditor has action of damages only against the clerks, if he shall be put to an action of proving the tenor; or even, if he shall lose his debt, or other right, by their negligent keeping, as just said. It is true, in actions of improbation, it is sufficient to stop certification against writings registred in the general register at Edinburgh, where the principals are left in the record, to give in a Condescence of their registration, viz. to particularize the place of the record where they are to be found; but, if the clerk vouch that no such writings are there, certification will go out, unless stopped in manner above related. Such condescence, as to writings registred in inferior courts, will not be received to the above effect.

c Hume decis.
63. Feb. 18.
1675. Brown.

THE like rule holds as to general and special charges to enter heir, or warrants of decrees, either before the lords of session, or inferior courts, with this variation, that, after 20 years, it is not necessary to produce them^c. But within that time, the clerks, who must be called in the improbation as to warrants of decrees, are answerable for the party's damage, if they are not to be found; but, as to charges to enter heir, they are given back to the pursuer, with the other grounds of the decree, and therefore, 'tis incumbent on him to produce the same.

15. Not necessary to produce general or special charges to enter heir; or warrants of decrees after 20 years.

SECTION II. *The negative Prescription of 40 Years.*

d P. 1469.
c. 28.
e P. 1474.
c. 54.

f Tit. cod.
de prescrip.
30. vel 40
ann.

g P. 1621.
c. 18.

THE negative prescription is, "when one's right or title of action is cut off, thro' his not suing upon it, or taking document thereon for 40 years." In personal obligations it took place with us antiently^d; and the old statute here referred to, is explained by a subsequent act^e, to extend to prior obligations older than 40 years, not in suit at the time; and so is declaratory of the civil law, whereby obligations were cut off by the prescription of 40 years, and most of them indeed by the course of 30^f; for otherwise the statute could not regularly have been extended to prior bonds, whether a suit had been commenced upon them or not; or rather it is declaratory of the canon law, whereby the prescription of 40 years was uniform, as above. And indeed the civil and canon laws were generally conjoined, when our legislature was forming a statute, after their exemplar. And this took place even after the canon law ceased, by the reformation, to have any proper authority^g.

16. The negative prescription, when one's right or title of action is cut off, by his not suing on it for 40 years, takes place not only against claims on personal obligations, but likewise against those founded on real rights.

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BUT to return. As to grounds of action upon real rights, it was only introduced by the statute 1617, which established the positive prescription. The regular prescription which takes place against all claims, where a shorter is not provided by subsequent acts, is, that of 40 years, by this later statute; for the clause of the statute is general, "That all actions upon heritable bonds, reversions, contracts, or Others whatsoever, shall be pursued within 40 years after the date of the same."

17. Does it commence from the date, or the term of payment, or from such time as the action grew, or could be sued.

THE old act 1469, does not set forth from what period the prescription commences in personal obligations; and the natural interpretation is, that it runs only from the term of payment or performance^a: but this later act expressly mentions the date of the writings, as the term from which the negative prescription of actions upon real rights commences. However, the exception therein subjoined, and the nature of the thing show, that either where the party is *Non valens agere*, by an impediment not arising from his own fault, or when the ground of action or pursuit on the writing did not then accrue, the date of the writing cannot be the period; and, in such case, the above rule, That prescription shall commence from the term of payment, must take place. Thus, actions of warrandice, by the express proviso of the statute, prescribe only from the date of the distress, whereby, doubtless, is meant Eviction, for till then the ground of action did not exist; and, for the same reason, actions of relief, competent to a cautioner, only prescribe from the time he makes payment of the debt. Hence likewise prescription will not run against a wife's liferent, till her husband's death, at which time only her action commenced, and so the court of session have in many instances found^b; and therefore the exception of actions of warrandice is set down in the statute, as an example, whereby to determine cases of the like kind, but not as a restriction to the same^c.

^a Feb. 19. 1680. Lute-
fut.

18. Actions of all kinds, and grounds of them, are cut off by this prescription, (except reduction on the head of falsehood). Jurisdiction and servitudes fall under it.

ACTIONS of all kinds, or grounds of action prescribe, if they have not been commenced, by executing a summons within 40 years. Thus, reductions on the head of death-bed^d, or other grounds (except that of falsehood) prescribe in the same manner^e. This prescription therefore excludes all claims whatever. Thus, a baillie of regality's jurisdiction, over the inhabitants within it, was excluded, by his suffering them to answer to the sheriff-court for 40 years without interpellation^f. Thus likewise, a servitude of pasturage, not only constituted by the claimant's charter, but likewise referred to in the disposition of the servient tenement to the defender's predecessor, was cut off by the negative prescription, which is founded on the presumed dereliction of the party^g. And, in like manner, where one had acquired right to lands, reserving to the grantor's wife her liferent of the same, this right of liferent was found cut off by the negative prescription, no possession having been attained, or action sued upon it for 40 years after the husband's death^h; for, after that period, the proprietor gained a legal discharge of her claim, in the same manner as if she had renounced it; and, after such long forbearance, it is next to impossible to know, but such was really the case; and therefore the law justly cuts off the claim.

^b June 22. 1675. Gaw.
June 25. 1675. Bruce.
Jan. 25. 1678. duke of Lauderdale. Feb. 5. 1680. Brown.
^c Jan. 25. 1678. duke of Lauderdale.
^d March 18. 1707. Murray.
^e Feb. 17. 1665. Butter.
Feb. 12. 1712. Scot.
^f Nov. 23. 1671. Rol-
land.
^g Feb. 1735. Graham.

^h July 5. 1711. Stewart.

TIT. XII. The negative Prescription of 40 Years. 167

ANNUAL Duties or Claims, as tithes, annualrents by infestment, annuities and tack-duties, prescribe yearly or termly, according as they are payable; because they are understood as so many different obligations accruing as they fall due: and therefore, tho' there hath been some payments, whereby the prescription of the principal obligation is prevented, yet the bygones, preceeding 40 years, are prescribed, and action will be sustained only for those within that time^a. But if the principal obligation itself is prescribed, by non-payment on the part of the debtor, or not using diligence by the creditor, within 40 years of the first yearly or half yearly payments falling due, there can nothing be demanded thereon, and not only those without 40 years of the process are prescribed, but likewise the debtor is free in all time coming; for the obligation itself, being prescribed, becomes extinct, and so nothing can be due thereon^b.

19. Annual duties prescribe severally, as so many different obligations for each year. Is the principal obligation, for such annual pre-station or annuity, cut off by the negative prescription.

^a March 10. 1627. Annominus. Feb. 7. 1666. Earl of Panmuir. Feb. 1672. Blair. l. 7. § 6. cod. de præscript. 30 aut 40 Ann. ^b June 30. 1671. Magdalen chapel. July 6. 1711. Stewart. l. 26. c. de usuris.

^c L. 7. § fin. c. de præsc. 30 Ann. July 1730. Lockhart.

THIS holds in annualrents out of lands or the like, relating to a stock; but if it is an annuity or pension subsisting by itself, without any regard to a stock, the principal obligation was found not to prescribe, by non-payment within 40 years, or not using diligence thereon in that time, the case being understood as if separate obligations had been granted for each year's annuity, and that the same prescribed severally; so that still all within the 40 years were due^c. But an annuity out of lands will be intirely cut off by the heritor's possessing them on a competent title, 40 years without interruption; for the act 1617 secures parties in their rights, by the positive prescription, against all burthens whatsoever: tho' the personal obligation may still be effectual against the granter and his heirs, if the decision above-referred to shall be regarded as a rule, which, with submission, I cannot but doubt.

THE case is different as to interest due by personal obligations, or bonds; for there the interest is due, as a quality of the obligation, and not annually or termly, as a distinct duty, but is purely accessory to the principal sum; and, consequently, if the bond itself is preserved from prescription, all interest due thereon, tho' for more than 40 years, may still be exacted, unless the debtor can give evidence of payment; for we have not adopted the regulation in the civil law, that the bygone interest could never exceed a sum equal to the principal^d. But, in England, the double sum in their bonds, restricted to the single sum truly borrowed, by the condition annexed, can never be exceeded by the interest; and when they are sued here, we follow the same rule^e.

^d L. 27. § 1. cod. de usuris.

^e Jan 2. 1679. Fraser.

BUT in all cases where no obligation arises, but a liberation is obtained, the prescription can take no place against the documents or evidences of it; for those are competent only by way of exception, which is perpetual: thus, discharges or receipts prescribe not. But a debt which is prescribed cannot be founded on as a ground of compensation, tho' it was a good debt at the time of the mutual concurrence, or when the reciprocal debts became due^f; because the creditor ought to have sued for payment before his debt expired by prescription. For tho' compensation operates *retro*, or may be drawn back to

^f Hume de- cif. 17.

20. The prescription does not concern deeds importing liberation from actions, as discharges, but reaches grounds of compensation.

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to the time of the mutual concurrence, yet, unless it is a subsisting debt when proponed, it cannot be regarded at all ^a.

^a L. 14. ff.
de compens.

21. Grounds of reduction prescribe, but intrinsic nullities of deeds or decrees do not.

ALL objections that may be grounds only for reducing the deed or diligence, are cut off by the negative prescription; but intrinsic nullities appearing on the face of the deed or decree, are not excluded by it, being pleadable by way of exception, which is perpetual ^b, and the defender cannot plead them, till he is sued on such deeds.

^b July 25.
1738. Ainsley.

22. The maxim. *Rei meræ facultatis nunquam præscribitur*, how understood.

It is a general rule, that *Rei meræ facultatis nunquam præscribitur*, A mere faculty, or power of using a thing, cannot prescribe. A faculty is either a Liberty granted by the public law, as the liberty to the feuars of ecclesiastical lands, to hold them of the crown as superior, from which they cannot be excluded by prescription ^c; or Private, competent to one in the exercise of his right, as to build on his own ground at his pleasure; to redeem a wadset; to take seisin on a charter; or the like. One, by forbearing the exercise of a faculty during the course of prescription, will not be hindered to use it, which is the import of the foreaid maxim: thus, the proprietor may raise his building to the prejudice of his neighbour, tho' he had forborn it ever so long. And one, by continuing 40 years to perform acts which depend upon a meer faculty to do them or not, will not be thereby subjected to a servitude by prescription: thus one, by coming to another's mill, and grinding his corn thereat, will not be liable to a thirlage, tho' he had used that mill 40 years, unless other circumstances concur, inferring an astringency.

^c P. 1633.
c. 14.
P. 1661.
c. 53.

23. Does one forbearing to use a right, competent by way of action, or not using a privilege for 40 years, lose the same by the negative prescription.

BUT when one has a faculty to exercise a right, which is competent by way of action, if the same is not sued within 40 years, it prescribes: this is the case of unregistered reversions lying dormant for that space, conform to the act 1617. And if one has a temporary reversion, subject to an irritancy, tho' he is not cut off by expiration of the term, yet, if he neglect to redeem within 40 years thereafter, the equity of redemption will be foreclosed; for every right in law or equity is excluded by the long prescription. This is contrary to the opinion of most civilians, who determine, that *Juri luendi pignoris nunquam præscribitur* ^d. In like manner, all grants of privileges prescribe by Non-user, if they are not used for the space of 40 years, as the liberty of fishing by cruives; of holding a fair, or the like. Nor is this contrary to the foreaid maxim, touching mere faculties; for the right, competent to the party by the grant, is cut off as derelinquished, in the same manner as if it had been renounced, which is not the case of the powers or faculties above described.

^d Voet. ad.
tit. de pign.
act.

SECTION III. Short Prescriptions.

24. Short prescriptions, exceptions from the long prescription, which is the rule.

HITHERTO I have discoursed of the long prescription of 40 years, which is the rule; but there are divers short prescriptions as so many exceptions from the rule; for the long prescription of personal claims is general, and took place in all cases, till the short ones were introduced in certain particular instances, by subsequent special statutes.

THUS,

Thus, there is a three months prescription of actions, for pains and penalties incurred by concealing exciseable goods or liquors, and thereby defrauding the revenue^a; but this does not extend to the impost of two pennies on the pint of beer and ale, in favour of Royal borows, granted by special statutes, without any such limitation^b.

25. The three months prescription of penalties in excise-concealments.

2. AGAIN, there is a prescription of one year, or year and day, in divers cases. The liberty granted to heirs, to deliberate whether they shall enter or not, prescribes in a year and day after the ancestor's death, or posthumous heir's birth, termed *Annus deliberandi*, within which, if they abstain from the succession, they cannot be pursued by the creditors of the predecessor^c; but, after the year, they may insist in exhibitions *ad deliberandum*, tho' they have immixed, unless they are actually entered. Year and day, is likewise allowed to heirs to enter upon inventory, or *cum beneficio inventarii*^d. The day is added to the year, to prevent dispute as to the expiration of the year; but what is done upon that additional day, is of the same import as if within the year. And services of tenants and feuars prescribe, unless yearly required in due time^e. And farther, by special statute, no right or disposition of an heritable estate, granted by the heir, in so far as may prejudice the predecessor's creditors, is valid, unless it is granted a full year after his death^f; and this nullity is pleadable by the creditors of the ancestor, whether they have done diligence within the three years next after his death or not^g. And the creditors of the deceased are preferable, on his moveable estate, to the creditors of the nearest of kin, confirming the same in terms of the late statute, provided they do diligence for affecting the subjects within year and day of their debtor's decease^h.

26. The prescription of one year, or year and day.

3. THE creditors of the ancestor have three years after his death to affect his heritable estate, and diligences perfected in that time are preferable to the diligences at the instance of the heir's creditors; but, unless the diligence is then completed by adjudication, there is no place for the privilegeⁱ; nor is there here any respect to minority; and they are *anni continui*^k. Thus likewise spuilies, ejections and intrusions, prescribe in three years after the cause of action, *viz.* commission of the fact, the years of minority being deducted^l. The statute 1579, which introduces this prescription, has the general words, *And others of that nature*, which I conceive do comprehend actions of trespass, and petty delinquencies, as battery, assault, or the like, for otherwise we have no prescription of them.

27. The creditors of the ancestor preferable, on his heritable estate, as to diligence perfected in three years; the same term allowed to spuilies, and several other grounds of claim.

HOUSE-RENTS, servants fees, mens Ordinars, *i. e.* a claim for aliment or maintenance, and debts of the like nature, prescribe in three years after they grow due; merchants and writers accounts, and furnishings in account by tradesmen, in three years after the last article; but it is competent to prove, by the party's oath, that such claims are still owing; actions of removing in three years after the date of the warning, without exception of minority^m. Action of wrongous imprisonment prescribes within three years after the last day of imprisonment, without deducting the years of minorityⁿ; and summons of error against persons of inquest, for a wrong service, in order to subject them to punishment, is barred by the lapse of three

^a Act 12. P. 1669. I W. and M. c. 24. § 16. ^b Decem. 19. 1708. tackmen of the customs of Edinburgh.

^c P. 1540. c. 106.

^d P. 1695. c. 24.

^e Feb. 6. 1734. Henderson. Fount. Dec. 13. 1693. feuars of Kinross. ^f P. 1661. c. 24. ^g Decem. 9. 1747. Taylor.

^h Act 41. P. 1695.

ⁱ P. 1661. c. 24. ^k Decem. 19. 1678. Paterfon. Marcus (prescription) March 1685. lord Ballanden. ^l P. 1579. c. 81.

^m P. 1579. c. 82, 83. Nov. 29. 1709. Marson. ⁿ P. 1701. c. 6.

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years after the date of the retour ; here the time of minority, and absence out of the kingdom, is excepted^a : but such action against affizers was complained of, as a grievance, at the revolution, and has been ever since refused.

^a P. 1494.
c. 57.

28. The quadriennium utile, allowed to persons to reduce deeds on minority and lesion.

4. A MINOR's privilege of reducing deeds on minority and lesion prescribes in four years after they attain majority, called *Quadriennium utile*, unless reduction is intended within that time ; but summons, executed in due time against the parties interested, pointing out the ground of reduction, and called, will save it for 40 years thereafter ; and the prescription runs only from the last step of procedure, as is the rule in all actions, except where it is specially provided otherwise.

29. The quinquennial prescription of ministers stipends, multures, and bargains about moveables, and of mails and duties of lands ; of arrestments ; of annual duties due by forfeiting persons ; and of the legal in special adjudications.

5. MINISTERS Stipends, multures, and bargains about moveables, prescribe in five years after the cause of action, unless such bargains are articles of furnishing by merchants and common tradesmen in account ; for then they prescribe in three years from the last article^b, as above-mentioned. Mails and duties, or rents of tenants in country farms, prescribe in five years after their removal from the lands^c ; but still there is place to prove, by the defender's oath, that such particulars are owing, and in none of those cases here specified does the prescription run against minors. If the rents of an estate are set in tack, the tack-duty does not fall under the quinquennial prescription, which only concerns the possessors of the ground^d. In like manner, arrestments on hornings or decrees prescribe in five years after they are laid, and on depending actions in five years after sentence^e. Bygone feu-duties, annualrents by infestment, or other annual duties due by forfeiting persons, for which no diligence was done for five years before forfeiture, are prescribed^f. The legal of special adjudications runs in five years^g, and of the general in ten, with consideration of minority, so far as the legal is prorogued or prolonged during the same, and till the minor arrives at 25 years complete.

^b June 1730.
Ewart.

^c P. 1669.
c. 9.

^d July 20.
1733. Nisbet.

^e P. 1669.
c. 9. P. 1685.
c. 14.
^f P. 1584.
c. 2. P. 1690.
c. 33.
^g P. 1672.
c. 19.

30. The possessory judgment acquired by seven years possession ; as likewise immunity from cautionary obligations, by seven years forbearance of diligence thereon.

6. THE benefit of a possessory judgment is acquired by seven years possession, and tho' action be intended for reducing the title of possession ; yet, if it is not insisted in for seven years, the benefit of the possessory judgment revives, nor does the privilege of minority, or the surcease of justice, prevent it^h. Thus likewise, immunity to cautioners takes place, where no diligence is done against them within seven years of their obligation. This holds where they are either bound expressly as cautioners so insert in the bond, or a bond of relief is granted to them, and intimated to the creditor before delivery of the bond of borrowed money : and, even where diligence is done within the seven years, it only saves the obligation for the principal sum, and the interest that fell due in that timeⁱ ; nor are minors excepted in this statute.

^h July 15.
1668. Earl of Eglington.

ⁱ P. 1695.
c. 5.

31. The decennial prescription of tutor and curator accounts.

7. TUTOR and curator accounts prescribe in 10 years after the minor's death or majority^k ; but action intended, and once insisted in, by a judicial step of procedure within that time, continues for 40 years, as all other actions regularly do. The contrary action, competent to the tutor or curator, likewise prescribes in the same period. And,

^k P. 1696.
c. 9.

And, consequently, bonds acquired by them, during their office, due by the minor's predecessor, are cut off by the prescription; for they could only claim such bonds as advancements made for the minor. It is otherwise as to bonds to which they had right, either before their office, or after its expiration; for those remain still due after the action of accounts is prescribed, because they have no relation to the office.

8. REDUCTION of retours prescribes in 20 years. Holograph writings, and subscribed accounts, likewise prescribe in that time; but are still good, on proving the verity of the subscription by the party's oath^a.

32. Prescription of 20 years.

^a P. 1669. c. 5.

9. PRESCRIPTION of church-lands, in some respect, is accomplished by 30 years possession thereof, before action of reduction intended. This 30 years possession of church-lands is improperly called a *Prescription*; for it gives no right to the possessor, but only supplies the want of the original foundations and mortifications of those subjects to the church, which had been, for most part, lost or destroyed during the troubles, on occasion of the reformation, as the act of federunt sets forth^b; and indeed, many of them were conveyed away by the abbots, and other prelates, who retired into foreign countries. On this account the court of session sustained a proof, by witnesses, of the churchmen's possession at the time of the reformation, and 10 years before, in place of their right. But such proof becoming impracticable, by the length of time, being 50 years after the reformation, the lords declared 30 years possession, before the suit, by which such rights were brought under challenge, sufficient for the above purpose, and to no other effect^c. Wherefore the defender must still produce a good progress from the ecclesiastical persons, or found his title on the positive prescription, as in other cases of real rights, and the competition will proceed accordingly in common course; and, if he is to take advantage from the subject's being church-lands, he must vouch it by a right from churchmen, or other authentic evidence. This will be requisite in the questions about the *decimæ inclusæ*, or the like. I have spoken a little of this formerly^d.

33. Possession of church-lands by a defender, 30 years before the action, liberates him from producing the mortification; this improperly called a prescription.

^b Act of Sed. Decem. 16. 1612. related by Spotisw. tit. Kirkmen.

^c Act of Sed. Decem. 16. 1612.

^d Sup. tit. 1.

SECTION IV. *Qualified Prescriptions.*

DIVERSE of those short prescriptions do not cut off the ground of debt, but only the mean of proof by witnesses, or some other privileges indulged to the action, and may therefore be called *Qualified Prescriptions*; thus, the triennial prescription of house-mails, servants fees, merchants accounts, and other the like debts^e; the quinquennial of ministers stipends, multures, tenants rents, and bargains about moveables, is only as to the mean of proof by witnesses; but still it may be proved, by the defender's oath or writing, that these debts are owing and unpaid^f.

34. Such of these short prescriptions, as only cut off the mean of proof by witnesses, may be called qualified prescriptions; these specified.

^e P. 1579. c. 81, &c. P. 1669. c. 9.

^f Dd. acts.

It is likewise a special quality in actions upon warnings, spuilies, ejections, arrestments, and for ministers stipends, multures, and mails and duties, that they, being once intended, prescribe, unless wakened

35. A special quality in actions, upon warnings, spuilies, ar-

restments, and other grounds; that, once intended, they prescribe, unless wakened every five years; and that for wrongous imprisonment, unless insisted in yearly.

and insisted in every five years, the years of minority being always deducted^a. And actions for wrongous imprisonment, once raised, prescribe, unless insisted in yearly thereafter, without exception of minority^b. But in other short prescriptions, where it is not particularly otherwise provided, the action, being intended on the ground of debt, continues for 40 years, being thereby made perpetual. Which is agreeable to the rule of the civil law, *Omnes actiones, quæ morte aut tempore periunt, semel inclusæ judicio salvæ manent*^c; and the prescription only commences after the last step of procedure in the action. This is the case of house-mails, merchants accounts, and other short prescriptions, where the action, once intended, is not required to be renewed every five years; and the same is thereafter cut off, only by the long prescription of 40 years.

^aP. 1669.
^c 9.
P. 1685.
^c 14.
^bP. 1701.
^c 6.

^cL. 139. ff.
de reg. juris.

36. A peculiarity in the prescription of holograph bonds and subscriptions in count-books.

In holograph bonds, and subscribed accounts, it is a peculiarity, that, after the 20 years prescription is run, they are still good, if the verity of the subscriptions can be made appear by the defender's oath; so that, while he is alive, it cannot be said, that there is any prescription in the case^d. And the verity of the ancestor's subscription may be likewise proved by the heir's oath of knowledge; but not by his oath of credulity, That he believes it to be his subscription, from the likeness of the writing to the deceased's other subscriptions; for, in that view, he is in the same case with strangers^e.

^dDd. act.
P. 1669. c. 9.

^eJuly 3.
1725.
Graham, obs.
by Edg.

37. It is likewise a quality in spuilies, ejections and intrusions, that after prescription is run, action still lies for restitution, and the true values.

AGAIN, tho' spuilies, ejections and intrusions, are said to prescribe in three years, yet that is only as to the violent profits, and oath *in litem*; but, as to the simple values and restitution, or real rents and profits of the subject, the action is still competent for 40 years; and, if litiscontestation was made with the deceased, his heir will be liable in the same manner as himself would have been^f. It would seem, that this regulation concerning spuilies and ejections may be extended, by parity of reason, to all acts of violences or trespasses, whereby damage is done by one to another. And the words of the statute, *And others of that nature*, point that way, as above hinted.

^fJuly 5. 1711.
Lewars.

38. The peculiarity in the prescription of cautionary obligations.

AND, lastly, it is a peculiar quality in the prescription of cautionary obligations, that, regularly, diligence done within the seven years of the date of the obligation, saves it only as to the principal sum, and the interest that shall fall due within that period^g, and that no diligence done upon the bond, against the principal debtor, will save it as to the cautioner. And the benefit of this liberation being introduced by the public law, to prevent men engaging, perhaps rashly, in cautionries, from being ruined, thro' the long continuance of the obligation, the statute cannot be dispensed with by the party^h.

^gP. 1695.
^c 5.

^hEdg. Feb.
19. 1724.
Hume.

SECTION V. Rules touching Prescription.

39. Rules in prescription are, 1. That the law of the place of the obligation determines the

THE following rules take place in prescription; 1. In the negative prescription, the law of the place, according to which the obligation was contracted, is the rule; because it has its binding force and effect from that law, and must accordingly lose it by the sameⁱ, *Unumquodque eo modo dissolvitur quo colligatum est*. But, in the positive prescription of moveables, the law of the place where the thing was possessed,

ⁱHume decis.
18.

possessed, during the due course of time, governs it; and if, before the prescription is fulfilled, the possessor removes with it to another country, the law of that place must be the rule for determining the length of time; since the law of the place, where the possessor resides, regulates his right to moveables, according to the common maxim, *Mobilia sequuntur personam*.

prescription, and, in moveables, the law of the place where possessed.

^a Voet. ad tit. de legib. pars 2da. de stat. § 6. et 7.

2. IN lands and heritage, the law of the place, where the subject is situated, is the rule of prescription, as in all other things relating thereto, and which is observed in all countries^a, especially where the feudal customs prevail, particularly with us.

40. 2. In heritage, the law of the place, where situated, is the rule.

^b Jan. 1724. Paton contra Drysdale. Hume (prescription) Decem. 24. 1728. presb. of Perth.

3. BY the negative prescription, only obligations, real or personal, can be cut off, but no right of property can thereby accrue, for that can only be acquired by transmission from the proprietors, or the positive prescription. Thus, tho' the proprietor has neglected to insist for recovery or possession of his property for 40 years, yet he cannot be thereby excluded from suing for it, unless the possessor has gained the property by the positive prescription; for only a right from the true proprietor, or from another, made sure by the positive prescription, can establish a right of property. After the positive prescription is accomplished, the author is presumed, *Præsumptione juris et de jure*, to have been the true proprietor, but not till then; so that, without the positive prescription, the competition must go according to the priority of the rights, by progress from the crown^b. But an adjudication completed by infestment, tho' a right of property, may be lost by the negative prescription, for thereby no new right is acquired to the debtor: his lands are disburthened only of the incumbrance; and if 'tis parcelled out to several persons, the possession or diligence of each is considered in the same light, as if they were originally so many adjudgers, so that it may prescribe as to some, and be saved as to others; for the possession or diligence of the one cannot be available as to the rights of others, independent of him^c.

41. 3. By the negative prescription, only obligations can be cut off, but not rights of property. The prescription in the case of infestment on adjudications.

^c Jan. 27. 1747. Clerk contra Earl of Hume.

4. ALL obligations and claims prescribe in 40 years only, unless a shorter prescription is shown, as to any particular kinds of them, for otherwise they fall under the generality of *Others whatsoever*, in the act 1617, as is above observed.

42. 4. The long prescription is the rule, where a shorter is not introduced.

^d July 6. 1671. Mac-Rae.
^e July 6. 1671. Monro.
June 30. 1671. Beidman.

5. PRESCRIPTION is counted *De momento in momentum*. The last day of the 40 years must be expired, to intitle the party to the benefit of it^d; and holy-days, as well as others, are computed, so that the time that completes it, is what the lawiers call *Tempus continuum*, and not *utile*^e: from this rule it is, that, unless the years of minority are expressly excepted in statutes introducing prescription, they are not deducted. Thus, the 40 years prescription does not run, during the minority of the party interested, by the express terms of the statute 1617. And in divers of the short prescriptions minority is excepted; and consequently, where it is not, the prescription runs against minors^f.

43. 5. Prescription counted de momento in momentum, and runs against minors, unless otherwise provided by statutes introducing it.

^f Decem. 12. 1712. Stewart.

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44. 6. Times of surcease of justice, regularly not deducted in the course of prescription.

6. ALLOWANCE is not made, in prescription, for the times of surcease of justice, by war or pestilence, or on other occasions; for such time is computed, unless remedy is given by special statute, ordaining it to be deducted^a. Thus, it required an express statute to deduct, out of short prescriptions, the time at the revolution, when the ordinary courts of judicature did not sit. And, at this present time, an act of parliament was necessary to subtract from the short prescriptions the time of the continuance of the rebellion that commenced in September 1745: and, no doubt, it would have been computed, if such statute had not intervened^b. The reason is, because the law having limited the right, or action thereon, to a certain time, it must expire by the lapse of that time, unless provision is made to the contrary; which must take place much more in the long prescription.

^a June 30. 1671. Beidman.

^b P. 1690. c. 40. 20 Geo. II.

45. 7. Contra non valentem agere non currit prescriptio: thus, it runs not against one under forfeiture; the case of a wife in claims against her husband, or third parties.

7. IT is a rule, that *Contra non valentem agere non currit prescriptio*; the meaning is, that prescription does not run against one that is under a disability to sue. Thus, while one is under forfeiture, or when a woman is under coverture of a husband, the prescription runs not against them^c: but this last takes only place in respect to rights which the wife cannot prosecute in her husband's time, as a liferent to take place after his decease; so that if a bond is taken to the husband and wife in conjunct-fee and liferent, the fee may be lost to the husband by prescription, and yet the liferent be entire to the wife^d; but, as to bonds due to the wife herself, the marriage does not hinder the prescription to run against her; because she has title to pursue, and, if her husband refuse to concur, the court of session will authorise her. As to claims competent to the wife against the husband himself, prescription does not run during the marriage, as in reduction of her contract of marriage, on minority and lesion, or redemption of adjudications, acquired by the husband of the wife's estate during the legal^e: for tho' such actions might be insisted in at the wife's instance, and wherein she would be authorised by a curator *ad litem*, yet the law will not necessitate her to do it, to prevent the bad consequences of such proceedings between husband and wife; and the husband, being as curator to the wife, cannot take advantage of the prescription against her, more than a proper curator can against the minor.

^c Feb. ult. 1666. Lauderdale. Jan. 25. 1678. idem. July 25. 1678. Whitefoord. ^d June 22. 1675. Gaw.

^e July 25. 1710. Chalmers. Bruce. Decem. 14. 1714. Greenhill.

46. Whether does prescription run against an idiot or furious person.

UPON this rule Dirleton and Stuart agree in opinion, that actions upon contracts do not prescribe against idiots; but lord Dirleton makes a difference between prescription of actions, and that of legal reversions of adjudications, and other limited reversions, which, according to him, run against idiots; for that they are only given for a certain time, within which they must be used, and are barred thereafter; because *jus limitatum*, to a certain time, *producit limitatum effectum*, viz. a limited action during that time; and that such limitation is just, *ne dominium sit in incerto*; and that the party cannot be in a worse case, by the condition of the reverser. In this last point Sir James Stuart dissents, and thinks, that a furious person, having right to such reversion, may redeem at any time after his recovery^f. Dirleton seems to be in the right, as I shall have occasion to shew more fully elsewhere^g.

^f Dirleton. (reversions competent to idiots.) et ibid. Stewart. ^g B. 5. tit. 2.

By

^a Edgar, Feb. 18. 1724. Elliot.

^b Jan 17. 1672. Young. Feb. 5. 1680. Brown. June 22. 1675. Gaw.

^c Feb. 19. 1680. Lute-foot. June 23. 1675. Bruce. Feb. 17. 1665. Butter. l. 7. § 4. c. de præscript. 30 vel 40 ann.

^d Dec. 23. 1630. Ogilvie.

^e Act 5.

P. 1695.

^f Fount. Decem. 17. 1707. Gordon.

^g Bruce, decif. 54.

^h Princ. inst. de usucap.

ⁱ Nov. 27. 1677. Grant. l. 19. § 1. ff. de acquir. possess.

By this rule, prescription does not run against a fiar, during a life-rent of the subject in the person of another ^a; because he had no action for payment or possession, and he is not bound to insist in a declarator of his right. This rule is not contrary to the preceeding fifth rule; for minors are capable to pursue; nor do the other cases therein mentioned concern any disability in the persons vested with the right at the time ^b.

By the same rule, the negative prescription of bonds, payable at a day certain, or under condition, does not run till existence of those; because, till then, the party is *non valens agere* ^c. If the year of the date is insert in the obligation, but not the month or the day, it is presumed to be dated the last month of the year, and the last day of the month, to save the creditor's right ^d; because the negative prescription is odious, and every equitable interpretation is admitted to exclude it. This rule admits of an exception as to the prescription of seven years in a cautionary obligation; for, as the statute ^e declares the cautioner free, if no diligence is done thereon against him within seven years of the date of the bond, the court of session have applied the law accordingly ^f. This liberation is not, in every respect, of the nature of prescription, but has many peculiarities, and this among others; so that if, perhaps, the bond is not payable for seven years after its date, the creditor must use inhibition, arrestment, or adjudication in security, within seven years, or otherwise the cautioner will go free. The lords once indeed found, that the statute did not concern bonds payable only seven years after the date ^g, but which probably will not be followed as a precedent, seeming not to be warranted by the statute, nor to quadrate with the decision above-referred to from Fountainhall.

8. IN usucapion, which with us is the positive prescription, the civil law required *bona fides* at the commencement of the possession, *i. e.* that the possessor truly, and upon good grounds, believed the thing was his own ^h. And the canon law made it necessary during the whole course of prescription. But with us, in the long prescription, no such requisite takes place, being intended to settle all questions touching that, or any other matter. Hence tho', according to the old maxim, one cannot change the title of his possession, yet, after the long prescription is run, no such question can be moved: for, notwithstanding it should be positively offered to be proved, that possession was at first attained on a precarious or temporary title, it will not be regarded, if the possessor has possessed as heritor 40 years, upon a lawful title of property, or as part or pertinent of his adjacent ground ⁱ.

SECTION VI. Interruptions of Prescription.

PRESCRIPTION only takes place where interruption is not used within the time limited to perfect it. Interruption of the positive prescription is either *Via facti*, by fact; or *Via juris*, by law or legal diligence: the first happens when the possessor either actually deserts the possession and relinquishes it, or when it is forcibly seized by another. This interruption is not only profitable to the party who enters into the possession, but in general to all persons whatever; because the possession was

47. Prescription runs not against the fiar, during a life-rent.

48. It runs not against bonds payable at a day certain, or under condition, till these exist; otherwise in cautionary obligations, by the statute 1695.

49. 8. In the positive prescription, *bona fides* always presumed, and which cannot be taken off by a contrary proof.

50. Interruption either *via facti*, or *via juris*: the first by the interrupter's assuming actual possession, or the other

party's de-
ferring it.

was quite interrupted, by the continuance whereof the prescription was to have been perfected, so that the person who recovers the possession can only begin the prescription from that time ^a.

^a L. 5. ff. de
usucap. l. 7.
§ 4. ff. pro
emptore.

51. Civil in-
terruption
via facti, or
by instru-
ment; this
derived from
the civil law.

THIS interruption may be called Natural, but there is likewise a civil interruption, *via facti*, of the positive prescription. It happens when the person who claims right to the lands, or other thing possessed, protests against the possessor, that his possession may not prejudice the claimant's right, and thereon uses civil interruption, and takes instruments in the hands of a notary. This instrument, when relating to real rights, must be registred in the register of interruptions, at Edinburgh, within 60 days of its date, otherwise it is null as to onerous singular successors in the lands or other rights, and only effectual against the possessor and his heirs, or gratuitous purchasers ^b: it is termed Interruption *via facti*, because it is founded on the extrajudicial deed of the party. This can only operate in favour of the party who uses it, but, as to others, it is *res inter alios acta*, and there is no discontinuance of the real possession. We have this kind of interruption, as I apprehend, from the civil law, which authorised such interruption, when one was erecting a building upon his own ground, to the prejudice of a servitude competent to the neighbouring heritor thereon, or, on the like occasion: he was interpellated *per lapilli jactum*, the casting down of a stone, and witnesses taken thereon ^c, and, in this interruption, it is customary to use such kind of solemnity.

^b P. 1696.
c. 19.

^c L. 5. § 10.
ff. de op. nov.
nunciat.

52. Interrup-
tion via ju-
ris, either by
summons of
interruption,
or by suit on
the right:
the requisites
in order to
the first.

INTERRUPTION *via juris*, viz. by legal diligence, has relation to both negative and positive prescription: it is either by way of Citation for interruption, or a Summons in prosecution of the right. The first must be executed against the debtor or possessor personally, or at his dwelling-house, and likewise at the parish-church, in time of divine service, or immediately after, and, if he is out of the kingdom, at the market-cross of Edinburgh, pier and shore of Leith. This order is to be observed, in a summons of interruption, as to the rights of lands; and farther, it must proceed on a bill to the court of session, setting forth the grounds whereupon it is founded, and both summons and execution must be registred within 60 days of the execution, as was said of instruments of interruption; and, whether it concerns real or personal rights, it must be renewed every seven years ^d. This interruption can only be good to the person that uses it, and those that derive right from him; for, as to all others, the possessor or debtor is not interpellated, and consequently, as to them, continues to prescribe. But this interruption, by citation for that purpose, resembles rather interruption by way of instrument *via facti*, than a judicial interruption; because such summons generally is not intended ever to be judicially insisted in, and therefore it is conjoined in the statute with interruption by instrument.

^d P. 1669.
c. 10. D.
P. 1696.
c. 19.

53. Action
upon the
right or debt
concerns
both positive
and negative
prescription.

THE other kind of interruption, *via juris*, is, where action is sued on the ground of the right or debt, in order to obtain possession, payment or security; and the summons being judicially called, is a sufficient interruption; and most of the regulations, in the statutes above referred to, do not concern such action ^e. It takes place in all rights personal and real, so that the possessor in all real rights, or debtor,

^e Dalr. Feb.
1705. Wil-
son.

^a July 12.
1664. Mont-
gomery. June
28. 1666.
Philorth.

^b Dalr.
Fount. July
21. 1699.
Earl of For-
far.

debtor, in all obligations relating to real or personal claims, cannot thereafter regularly perfect prescription, but must begin from the last step of the procedure in the action, and 40 years silence thereafter will give the benefit of prescription anew ^a. If a summons, tho' intended for prosecuting one's right, and not simply for interruption, be only executed, but never judicially called, it falls within the foresaid statutes, and the interruption prescribes in seven years, unless renewed in that time. This was found in the case of a reduction upon minority and lesion, regularly executed within the *quadriennium utile*, but never judicially called, and therefore a new summons, to the same effect, after the seven years, was rejected ^b.

THIS interruption can only avail the pursuer, and those deriving right from him, or whose interest is connected with his, and in respect to the rights and titles then belonging to him; but it can have no effect in favour of third persons; because, as to them, it is *Res inter alios*, nor have they interpellated the party, who therefore continues in the same state, in regard to them, and their pretensions, as if no action had been sued.

FOR the like reason, if a creditor assign part of his bond, the cedent using diligence for the remainder, or the assignee for the part assigned, will not interrupt the prescription, as to the sums for which no diligence is sued, more than if they were contained in a separate bond; for, as the negative prescription is grounded upon a presumption of payment, doubtless the debtor might have paid the one, and still be indebted in the other.

IN our old statute, the creditor who uses this interruption, is said to Follow the obligation, and take Document (*i. e.* legal evidence) thereon. Tho' regularly an action or suit interrupts for 40 years; yet, in some cases, it must be awakened or insisted in within a certain limited time, as was already remarked, which, if omitted, the case is the same, as if action had not been sued, the same being prescribed. A summons libelled and executed is a following of the obligation, and proper document taken thereon; and consequently, tho' it should be allowed to fall, whereby the instance perishes, yet regularly it would seem to be a sufficient interruption, provided it was libelled when executed; for a blank summons can have no effect, since it does not relate to any particular claim. An act of continuation was formerly requisite, in order to a citation for the second diet of compareance, but a citation upon the first summons was sufficient for interruption ^c. And now the citation to both diets being in virtue of the original summons, it must have the like effect, as a second citation would of old upon an act of continuation, which was never doubted to be a good interruption: however, such summons will lose its effect as to interruption, if not renewed within seven years after executing it; for the interruption, in such case, prescribes, according to the above quoted decision with respect to a reduction upon minority and lesion ^d. But if a statute, in any particular instance, requires, that the action must not only be raised, but insisted in, then the bare executing the summons, without a judicial step therein, will not do. This is the case of prescription of tutor accounts, by the statute ^e.

^c Feb. 17.
1665. Butter.
July 6. 1671.
MacCrae.

^d Fount.
July 21.
1699. Earl
of Forfar.
^e P. 1696.
c. 9.

54. This interruption only good against the party sued, and in behalf of the pursuer.

55. If part of a bond is assigned, a suit, at the cedent's instance, will not interrupt as to the part assigned, or on the contrary.

56. A summons libelled and executed, tho' never called, interrupts; but the interruption prescribes, unless renewed within seven years.

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57. A diligence, tho' labouring under material defects, sometimes good for interruption; a decree of registration no interruption: how far a charge to enter heir in general interrupts the prescription. A charge to make payment interrupts it.

THO' an executed summons, or a decree, labour under considerable defects, it will be sufficient for interruption. Thus, an informal execution was sustained to that effect^a; and a decree of poinding the ground was found a good interruption, notwithstanding the heritor was not called^b. But, if the execution is intrinsically void, as not being before subscribing witnesses, or the like, it can be no interruption; because the party was never cited in the sense of law. And for this reason, summary registration does not interrupt, tho' it is a decree^c, for it is done without citing the party, and so is no document taken against him; but a charge to make payment, whether on a horning, or precept from an inferior judge, is effectual. A general charge to enter heir, regularly, does not interrupt; because commonly it mentions no particular debt, but if it do, the case will alter; for that, in effect, were an authoritative demand of the debt, and an inchoat diligence for recovery of the same, and consequently a document in the sense of the statute^d.

^a July 6.
1671. Mac-
Cove. Nov.
25. 1665.
White.
^b June 25.
1666. St.
Clair, July 6.
1671. Mac-
Crae.
^c Jan. 12.
1672. John-
ston.

58. The prescription of legal acts or diligences, affecting the heritable or moveable estate of the debtor, how interrupted.

THE prescription of legal acts or diligences will not be interrupted by action upon the ground of debt, or any pursuit, that is not directly a following out that particular diligence. Thus, an adjudication, whereon possession is not attained, will prescribe; unless an action of mails and duties, or some other suit upon it, is insisted in, within 40 years of its date. And an inhibition will prescribe within 40 years of the deeds in contravention of it, if reduction upon that head is not sued within that time. And arrestment will fall in five years after its date; tho', in all these cases, the ground of debt had been insisted in, and preserved by personal diligence^e.

^d July 16.
1708. Thom-
son. Feb. 17.
1713. Li-
vingston.

59. How far inhibition of tithes a good interruption.

INHIBITION of tithes interrupts tacit relocation, as it does former use of payment, being in effect an authoritative demand, of the *ipsa corpora* of the tithes. But it may be doubted, how far it interrupts the positive prescription of them, especially where it is served only in general at the church-door; since that must be regulated by the statutes touching interruption of the prescription of heritable rights above related; but the court found such inhibition valid to interrupt the positive prescription^f. However, the titular's prosecuting the inhibition, by entering to draw the tithes, or suing an action for the same, will undoubtedly be a good interruption, to all intents.

^e June 22.
1681. Ken-
noway.

^f Jan. 25.
1678. duke
of Lauder-
dale.

60. Requisition on an heritable bond or wadset, and protest of a bill of exchange, good interruptions.

REQUISITION upon a clause in a wadset, or heritable bond, duly used, must operate interruption, as it hath considerable effects in law, being a demand of the debt authorised by the very constitution of the right. Premonition on the part of the debtor must be equally effectual to interrupt, being an acknowledgment of the debt, and a solemn offer of payment, in terms of the obligation. And for the same reason, protesting of a bill of exchange for non-payment must interrupt prescription of such bill; for it is a demand warranted by law, in such kind of obligations, and which is of no small importance. But other extrajudicial demands, tho' by missive letters, cannot be regarded as documents taken on the debt, and therefore cannot interrupt the prescription^g.

^g Hume (pre-
scription)
p. 128. Feb.
12. 1737.
Rutherford.

AN

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^a Jan.
1734. baillie
Haliburton.

AN obligation, by a third person, to pay all the debts in general, owing by a person specially named to the creditor in such general obligation, will not interrupt the prescription of any of them^a; because it is not an acknowledgment of any debt in particular, and so is no document taken thereon; and, for the same reason, such obligation, by the debtor himself to the creditor, would not avail as an interruption.

61. A general obligation by the debtor, or third person, to pay all the debts he owes, no interruption.

^b June 22.
1681. Ken-
noway.

A GENERAL submission of all questions, claims and demands, will not interrupt as to any particular, unless it is made appear in a proper way, that a claim was entered upon it before the arbiters; for otherwise it cannot be more effectual than a blank summons executed, which, if not filled up, and judicially called within the 40 years, does not interrupt the long prescription^b. But where a submission is particular, or, upon a general submission, particular claims are entered before the arbiters, the prescription, as to these particulars, is interrupted; in the same manner, as if they had been judicially claimed by action, even tho' no decree-arbitral should follow on the submission; because, by consent of parties, the claims are made before arbiters, in place of judges, and consequently the creditor is following out his obligation.

62. A general submission does not interrupt, as to any particular claim, unless the same was entered before the arbiters; but a particular submission does interrupt.

BUT if the debts, or other claims entered before arbiters, were prescribed before the submission, it cannot revive them; and therefore, if the submission breaks up, the party may still plead prescription, as if no submission had been; for, in that event, parties return to their rights, as they stood before the submission; and the case is the same, as of an action intended upon a ground of debt, which was prescribed before commencement of the suit.

63. If the debts were prescribed before the submission, it does not revive them.

^c Decem. 18.
1667. Nicol-
son.

As interruption by diligence, against any of the co-obligants in an obligation, so partial payment by any of them will save the obligation from prescribing as to all^c; because the creditor thereby took document upon the obligation, which therefore he cannot be understood to relinquish, and consequently all the debtors therein must remain bound, as if document had been taken against all; for the creditor who receives his interest from one of them, or was expecting payment, by diligence against one, had no reason to trouble the rest. This is the case where the debtors are bound jointly and severally; but, if they be only joint debtors, and not severally liable for the whole debt, payment by one of them, of his proportion of the debt or interest, or diligence used against him, for his part, cannot save the obligation against the rest from prescribing; because they are as little concerned for one another, as if they were bound by several obligations.

64. Interruption by diligence, against one of the debtors for the same sum, interrupts as to all; as likewise does partial payment by any of them; it is otherwise where they are bound jointly, and not severally.

BUT the statute, in favour of cautioners, requires, that diligence must be done against them within seven years of the date of the obligation, and otherwise declares them free of the debt: therefore, in this case, no diligence against the principal will save the obligation as to the cautioner, as was before observed. Nor indeed will partial payment,

65. Exception from this rule, in the case of cautioners, by the act 1695.

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payment, by the cautioner himself, within the seven years, continue the obligation against him thereafter, as shall appear presently.

66. The detention of an hypothec a kind of interruption; for the detainer may still retain his pledge till the debt is paid.

THE detaining of an hypothec in security of a debt is a kind of interruption, or tacit claiming it: thus, a writer's account will not prescribe while he has his client's writings; as neither will an artificer's wages while he retains the subjects, or part of them, whereon his labour was employed; because he may plead the account by way of defence, which is perpetual, and prescribes not: but the debt cannot be insisted for by way of action, after expiration of the legal course of time, in respect of the prescription^a. The creditor can only then recover it by disposing of the hypothec, which the judge-ordinary, upon proper application, will authorise, the person interested being always summoned to such judicial sale, or roup of the pledge.

^a Nov. 29.
1709. Earl
of Aberdeen.
Jan. 18.
1712. Mit-
chell.

67. The concurrence of a mutual claim does not save the counter-claim from prescribing.

THE concurrence of a mutual debt will not interrupt prescription: thus, if I owe a bond to one, who is likewise my debtor in another, and his debt is saved from prescribing, by minority of the heir or otherwise, and the debt owing to me is prescribed after the mutual debt became due by me, I cannot found compensation upon that debt, against payment of the bond due by me, more than I could recover it by suit; because the insisting upon compensation is a reciprocal demand, *mutua petitio*, which cannot be made on a bond that's prescribed, whereby the debt becomes extinct, as if it had been discharged, or never owing^b.

^b Hume de-
cif. 17.

68. Any deed of the debtor, importing an acknowledgment of the debt, interrupts the prescription of it.

THE intent of legal diligence is to make the right effectual by possession, payment, or security; but if the debtor, of his own accord, own the other's claim, there is no occasion to sue for the same. Therefore any deed from the debtor, importing an acknowledgment of the debt or claim, excludes prescription as to the time preceeding its date, so that it must commence anew from the date of such deed, importing the subsistence of the debt or claim: but a servant's attesting an account will not prevent the prescription of it from running, tho' he was entrusted in the business^c.

^c Edg. Feb.
11. 1724.
Guthry.

69. Does a charter to an adjudger in obedience; or a precept of feisin to an heir, pursuant to a charge for that effect, import an interruption.

BUT a charter of adjudication, by a superior, in obedience to a charge; or a precept, for receiving the heir pursuant to a charge, in consequence of a retour, will not infer an homologation of the receiver's right; for the clause, *salvo jure*, in favour of the superior, express or implied, will save to him not only any positive right, but likewise all objections competent to him, as before granting those deeds, the same being in obedience. Therefore, if the right adjudged, or wherein the heir is entered, was an annualrent, or wadset holden of the debtor, it may seem that such charter or precept will not take off or exclude prescription; for they are only granted, in order that the progress may be completed, but are not documents toward payment or security of the debt, or acknowledgment of the same; but the debtor ought to protest, that he does it only to that effect.

70. In case of partial payments,

PAYMENT of any part of the debt, principal or interest, interrupts prescription of the whole, as above^d; because thereby the debt is owned,

^d Decem. 18.
1667. Nicol-
son.

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owned, and prescription, being founded on a presumed payment of the debt, is excluded by such deed; but the vouchers of payment being in the debtor's hands, the creditor is not secure, after the years of prescription are run: therefore, to evite such danger, he ought to take a declaration from the debtor that he had made such payments, and got receipts and discharges thereon. This was frequent with the Romans, and is recommended for preventing the defence of prescription, in case the debtor, or his heir, should lose or abstract the discharges, and deny the payments. Such declaration, granted by the debtor to the creditor, in relation to partial payments, was called *Antapocha*^a, i. e. a counter-writing from the debtor, acknowledging the payment made by him, and his receiving a discharge accordingly, and is an expedient adviseable to be followed, in order to prevent the above danger.

^a L. 19. cod. de fide instrum.

adviseable for the creditor to take a counter-acknowledgment of such payment.

IF one have an infestment of annualrent upon two tenements, and receive his interest out of one of them, the heritor of the other cannot plead either negative or positive prescription against him; because his debt being saved is a burthen upon the whole subject on which it is constituted. The case is different in an adjudication perfected by infestment; for the creditor's possessing part of the subject, during the years of prescription, and using no diligence as to the rest, acquires only right to the lands he possesses. The heritor obtains an immunity from the incumbrance by the positive prescription, and the adjudger loses his right by the negative: it is *præsumptio juris et de jure*, after the prescription is run, that the creditor accepted the lands he possesses in full of his claim.

71. The case of an annualrent out of tenements belonging to different heritors; or of an infestment upon an adjudication as to prescription.

BUT partial payment concerns only the interruption of the long prescription, founded on the creditor's dereliction of his claim, which is taken off by his receiving part of the debt. But as to the short prescriptions, that cut off only the creditor's mean of proof by witnesses, partial payments, within the time of prescription, can have no effect to interrupt it, but rather fortifies the same; for it is founded on the presumption of payment of the whole debt, which can only be excluded by writing, or oath of the debtor, that the same is still owing^b; but, in the long prescription, the presumption of payment is *juris et de jure*, excluding all probation to the contrary.

72. Partial payments within the years of prescription, do not interrupt the short prescriptions.

^b July 10. 1729. Nisbet.

THE septennial prescription of cautionries is of a singular nature. It is a limitation of the action, and not founded on a presumption of payment within the seven years: however, partial payment within that time will not bar it; for the seven years, being the time limited by statute, within which the action must be brought, and the cautioner otherwise declared free, he cannot be fixed for the remainder, which, being still due only by a cautionary obligation, is within the statute, and so must be thereby cut off; in the same manner as the whole obligation would, had it remained entire, by the rule of law and nature, that *in toto et pars continetur*^c, a part is contained in the whole.

73. Nor will partial payment by a cautioner save the obligation from prescribing, by the act 1695, as to the remainder of the debt.

^c L. 123. ff. de reg. juris.

THIS limitation of the action and ground of debt, being, by a public law, made for the common good, to prevent the great prejudice,
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74. Limitation of the cautionary obligation.

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gation, by the act 1695, cannot be dispensed with by the party; will a promise of payment make it commence only from the date of such promise.

and frequently the ruin of families, incurred by persons too easily engaging in cautionries, cannot be dispensed with by the party^a, as above. And, for the same reason, it may seem, that a promise of payment, within the seven years, ought not to exclude the benefit of the statute. The court of session most justly found, that such promise by the cautioner's missive letter had the effect, that the prescription did only run from the date of the letter^b. If such promise were an interruption in the proper sense, it should save the obligation for 40 years thereafter, which is the case of all interruptions, unless it is otherwise provided by statute. But the promise by the missive letter was a new cautionary obligation, and therefore behoved to subsist for seven years, in terms of the statute, and no longer.

^a Feb. 19. 1724. Norrie, observ. by Edg.

^b Bruce Jan. 19. 1715. Gordon.

75. Tacit relocation does not hinder the positive prescription to run, on 40 years possession, upon an heritable title, after expiration of the tack; what if the tack was still current.

TACIT Relocation is a joint deed of the possessor and letter, implicitly acquiescing to the continuance of the set, and excludes all title of property in the possessor; so that, the possession having begun upon a tack, he cannot invert the title of his possession, and, by a right from another, exclude him from whom he had the possession: but tacit relocation, and interversion of possession, is no good objection, after the course of the long prescription, by possession upon a title of property, is run, as I observed already, in case the antient letter claimed no right, nor the possessor acknowledged him during that space^c: therefore the positive prescription, upon such title of property, will perfectly secure the possessor, notwithstanding a tack, of which the term was expired before commencement of the prescription. The case is more difficult, if the tack was not expired: but it would seem, that as there can be no doubt where the heritable title proceeds from the letter, so, in the case of its being acquired from another author, the old tack, whereupon no claim was made during the long prescription, would be cut off, and antiquated by the negative prescription, and the possessor would acquire the property of the lands by the positive prescription, to which an interversion of the possession cannot be objected.

^c Nov. 27. 1677. Grant.

SECTION VII. *Prescription how far justifiable.*

76. Prescription founded in the law of nature and nations; but the term for accomplishing it varies according to the positive law of each nation.

PRESCRIPTION is the great security to people in their rights and possessions; without it no person could almost call any thing his own, nor be safe against claims that were not heard of perhaps for hundreds of years. Wherefore it is justly observed by the Roman lawier, that prescription was introduced for the public good, that mens properties might not be always at an uncertainty; *Bono publico usucapio introducta est*, (says Gaius) *ne fere semper dominia incerta essent*^d. Prescription, as it is a necessary remedy for ascertaining mens rights, so it is founded on natural equity. The presumption is, that one, who possesses for a long course of time, possesses by a just right; and that the old proprietor was duly denuded. And that one who ceases to make use of his right, for a long term of years, has renounced it; or that there was nothing truly due to him: and the law has rendred this *Præsumptio juris et de jure*, and thereupon transfers the right from the former owner, or creditor, to the prescriber. Wherefore the inspired judge of Israel, of old, upon this ground justly made answer to the claim of the children of Ammon, of a tract of ground that had been

^d L. 1. ff. de usucap.

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^a Deut. xi.
26.

been long possessed by the Israelites, *Why did ye not recover it in that time*^a? Thus, prescription, in general, is founded in the nature of things, and conducive to the peace of mankind; but as to the time for completing it, no certain rule is fixed by the law of nature. Therefore the precise time, or number of years in which prescription shall be accomplished, is introduced by positive law, and varies in different countries, and is subject to the arbitrary rules prescribed by their respective laws.

WHERE the right, or ground of debt, is wholly cut off, as the case is in the long prescription, the other party may, without impeaching his conscience, take the benefit, in the same manner as if the former proprietor or creditor had relinquished or renounced their pretensions; because the right is discharged and extinguished by the public law, to which all our rights are subject. And therefore it is absurd to term prescription an Impious defence, since it is equally just and reasonable, as the other laws instituted for the good of the common-wealth.

77. After a debt or claim is cut off by the long prescription, the party may, with a good conscience, take the benefit of it.

^b Covar. var.
resol. tom. 1.
§ 2. p. 455.

WHEREFORE the party who has acquired a right by the long prescription, or liberation thereby from an obligation, may, in point of conscience, hold the property of such thing from the former owner, or plead an immunity from the debt. And this follows of course from the premises: for the former owner or creditor, after the prescription is accomplished, lose their right, which, by a just law, is transferred to the other. Yea, the most learned of the canonists are of opinion, that the former owner cannot, in point of conscience, intermeddle with the thing, which, after the prescription, is become another's^b. It is a consequence from the above rule, that courts of equity, and arbiters, ought to regard prescription as much as the courts of law; because otherwise, under pretence of equity, they would be guilty of injustice.

78. What if the prescriber afterwards find who was the former owner. Courts of equity, and arbiters bound to regard prescription.

^c Covar. ib.

^d L. 48. ff.
de reg. re
dom. l. 15.
§ fin. ff. de
usucap. et
refuc.

^e Cap. ult.
ext. de præ-
script. reg.
2. de reg. jur.
in 6to.

BUT if, during the course of prescription, the possessor or prescriber come to know who is the true owner, or that the debt is just, from which he thereafter prescribes a liberation, I conceive that, in point of conscience, or in *foro interiori*, he ought not to plead it according to the just opinion of the canonists^c; for tho', by the civil law, the supervening *mala fides* of the possessor did not hinder the usucapion or prescription to proceed^d, for preventing law-suits, and for punishment of the negligence of the proprietor that does not look after his effects timely, yet one cannot, with a good conscience, detain from another what is his; and, before accomplishment of the prescription, the law does not transfer the property to the possessor. Therefore, in this respect, the canon law, which requires *bona fides* throughout the whole course of prescription^e, seems to have improved upon the civil law that makes it necessary only at the commencement. We make no enquiry into the party's *bona fides*, but only require a just title, and the course of 40 years possession. But that does not hinder one from being guilty before God, and, in point of conscience, if he detains from the owner what is his, after he knew that to be the case, and before the law transfers the right to him

79. Can prescription be pleaded with a good conscience, if mala fides supervens.

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him the prescriber, which is not done till the whole time limited is elapsed.

80. What if the ground of debt still subsist, and the mean of proof by witnesses only be cut off.

WHERE the ground of debt is not cut off by prescription, but only the mean of proof by witnesses is excluded, the debtor cannot honestly take the benefit, if he knows the debt to be still owing; because the law does not discharge him of the debt, but only secures him against the danger of a groundless claim, by not admitting of a proof by testimony of witnesses, after a certain number of years; and therefore, tho' the creditor should not insist for his oath, yet he ought, as an honest man, to make payment; for otherwise he defrauds the creditor of his money.

Observations on the Law of England, in relation to the Premises.

1. Right to lands, by the common law, not acquired by prescription.

By the law of England, long possession is the best evidence of right; but, in form of pleading, one cannot make a title to land by prescription, but only to rent or profit out of land^a. Which is otherwise by our law, as above.

^a Littl. fec. 170.

2. Prescription is only applied to incorporeal inheritances, as common of pasture, and requires possession, time out of mind; and nothing can be prescribed, but what may be gained by grant.

PRESCRIPTION therefore in England is always applied to incorporeal inheritances, and relates to fee-simple; as where one, and those in whose right he comes, time out of mind, seized of such a manor, have always had common of pasture, as appertaining thereto, in another manor^b. And, in the common law, is understood of possession time out of mind; so that 40 years possession will not avail, if the commencement is within memory, and can be proved. And it is a common case in chancery, that where a man has used to have a rent out of such a manor, time out of mind, but knows not by whom he has it, or what kind of rent it is, whether rent-service, &c. if it be detained, he may sue for the same there, and obtain it^c. And nothing can be prescribed for, that cannot be gained by grant; for the law allows prescription only to supply the loss of a grant^d.

^b Littl. fec. 170. et ibid. Coke.

^c Vin. (prescription) p. 398.
^d Ibid. 278.

OUR law would not sustain any rent-charge upon lands, without a lawful title in writing, which no length of time could supply; and, in a question with purchasers of the land, it behoved to be duly registered; and if it were otherwise, the security by our records might be defeated.

3. Custom, somewhat different from prescription.

CUSTOM is somewhat different from prescription, and is local in some manor, or other place, and not alleged in any person, as "that all the copyholders in such manor have, time out of mind, used common of pasture, in such a waste of the lord, parcel of the manor." I have already discoursed of such prescription and custom^e.

^e Sup. tit. 7.

4. The limitation of a writ of right to 60 years, and that of other actions to 50, 40, or 30 years.

THE negative prescription of actions, is called in England a Limitation of them, viz. to a certain time, within which an action may be brought. The limitation of a writ of right is 60 years, next before the test of the writ, by statute: which likewise sets forth the limitation of other actions, to 50, 40, or 30 years^f. But with us, such actions must be brought within 40 years; that being the general rule fixed

^f 32 H. VIII. c. 2.

TIT. XII. Observations on the Law of England, &c. 185

fixed by statute, but the years of minority of the party claiming are not counted.

* 21. James I.
c. 16.

ALL writs of Formedon in descender, remainder or reverter, for recovering the estate of one's ancestor, must be sued within 20 years, after the title accruing, otherwise such title shall for ever be barred, and all persons having any right or title of entry into any lands, must enter within 20 years after the title accrued: but the titles of any infant, woman-covert, or *non compos*, imprisoned, or beyond seas, are saved, if they commence their suits within 20 years after such imperfection is removed^a. With us, any person may serve heir to his ancestor at any time, and recover the inheritance, provided no other was served heir to the same person; for, if such service is not brought under challenge by the righteous heir, within 20 years, he is cut off for ever; but the years of minority, or while the true heir was beyond seas, are not counted,

5. Writs of formedon in descender, remainder or reverter, limited to 20 years; titles of infants, femmes covert, a person non compos, imprisoned, or beyond seas, saved.

By the statute of James I. above referred to, likewise a limitation of personal actions is introduced. Thus, all actions upon the Case, (other than for slander) actions of account, (other than what concerns merchandise between merchant and merchant) actions of trespass, *Quare clausum fregit*, debt upon lending or contract without specialty, for arrearages of rent, actions of detinue, trover and replevin, shall be commenced within six years after the cause of action, and not after.

6. Limitation of certain personal actions to six years.

ALL actions of trespass, assault, menace, battery, wounding and imprisonment, shall be commenced within four years after the cause of action, and not after. All actions of the Case, for injurious words, shall be commenced within two years of the words spoken, and not after; but the right of infants, &c. is saved in the same manner, as above.

7. Actions of trespass, &c. limited to four years, and for words to two.

THE ground of action is cut off by this statute, where the limitation takes place. But with us, in such short prescriptions, the mean of proof only by witnesses is excluded, and the party may still prove his debt by the defender's oath, that the same is owing. Many of these actions prescribe in five years, and after they are commenced, prescribe still with us, unless they are awakened every five years. Which does not appear to be the case in England.

8. The ground of action cut off by such limitation.

BILLS of exchange, and promissory notes, fall under the foresaid statute of limitation, and are limited to six years. But we have no other rule for the prescription of them, than the long prescription of 40 years; which is inconvenient, and therefore our judges do not sustain action upon them, if they have lain over for a long course of time, as 20 years, unless the debt is proved to be owing by the party's oath: and there is a bill brought into parliament, for an act, reducing bills and promissory notes to the same regulation with us, as in England, which, it is not doubted, will pass into a law.

9. Bills of exchange and notes fall under the limitation of six years.

ACTIONS of account, by our law, prescribe within three years after the last article, and which takes place, even as to merchants accounts:

10. Merchants accounts do

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not fall under the limitation, unless closed.

11. How far actions of trespass prescribe by the law of Scotland.

counts. And, by the statute in England, if the account is stated and closed, the time of limitation runs thereafter.

WE have no express prescription of actions of trespass, assault, battery or wounding, unless the same could be comprehended under the words, *And others of that nature*, subjoined to the triennial prescription of spuilies and ejections in the statute ^a.

^a P. 1579.
c. 81.

12. The plea, *solvit ad diem*, takes place against bonds, after 20 years forbearance.

BY the law of England, there is no limitation as to actions upon bonds, by statute; but, notwithstanding, if there is no suit upon a bond for 20 years, or interest paid during that time, the plea of *Solvit ad diem* will be good, unless some reasonable cause be shown for so long forbearance; for otherwise the presumption, that such bond has been paid, will take place ^b.

^b Vin. (length of time) p. 52.

13. Suit in chancery, denied upon old bonds or claims, after 40 years, and sometimes fewer.

SUIT in chancery is denied, upon old deeds or securities sleeping for 40 years; and even a shorter time will be sustained to cut off the claim. Thus, a bill in chancery for the remainder of purchase-money, after 33 years, and no suit for it before, but the land peaceably enjoyed, was dismissed, and no relief granted ^c. One barred at common law, by the statute of limitation, can have no remedy in chancery ^d.

^c Ibid. 55.

^d 21 James I.

14. The statute of limitation extends not to tithes, or other claims founded on statutes, nor to suits in equity, nor to rights of advowsons.

THE statute of limitation is not extended to a demand of tithes; because it is founded upon act of parliament, or to any other debt so founded; for all the actions that it limits, are suits at common law. And for this reason likewise it does not concern a suit in equity, upon a trust before the court of chancery ^e. Nor are actions of *quare impedit*, or an assize of *Dareine presentment*, within the statute of Henry VIII ^f. for such concern the maintaining advowsons, by presentation of a clerk to a void benefice, and the incumbent may live beyond the time mentioned in the statute ^g.

^e Vin. (limitation) p. 108, &c.
^f 32 H. VIII.

^g Vin. ibid. p. 157.

THIS last may be of use, in considering the case with us of the prescription of a right of patronage, which, from the reason of the law of England, may seem not capable of falling under the negative prescription of 40 years; as it may likewise not be the subject of the positive prescription; but it is otherwise, of which I have discoursed fully in the proper place ^h.

^h Sup. tit. 8.
§ 91.

15. Forbearance for 20 years a good bar in equity, against open accounts of merchants.

ACCOUNTS among merchants not closed, or open accounts, are an exception from the statute of limitation, so that action is good for the same after expiration of six years; but, if there is a forbearance of suit for the same for 20 years, it will be a good bar in equity; for such accounts are understood to be deserted ⁱ. With us, after three years discontinuance, open accounts prescribe by a presumed desertion, and are then only effectual, upon proving, by the defender's oath or writing, that the same are still owing.

ⁱ Vin. ibid. 110.

16. Actions upon an Award, tho' by parol, for legacies, or for arrearages of

ACTIONS upon an Award or arbitrement, tho' on a parol-submission, are not within the statute of limitation, not being founded on any lending or contract. And, for the same reason, neither is a debt due by will, or a legacy barred by that statute: and, tho' arrearages of rent

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rent are mentioned, as within it, yet, as to these, it is construed to extend only to rent reserved upon a lease-parol, and not upon a lease in writing^a. As to this last, our prescription of rents extends to arrears on a lease in writing, as well as upon a verbal one.

^a Vin. ibid.
112, 123.

As the judgment of a foreign court is considered, in the law of England, as a simple contract-debt only, and must be tried in the same manner as such contract, so the statute of limitation takes place against the same^b.

^b Vin. ibid.
111.

THE statute of limitation is prevented, by the defendant's being beyond seas, as well as by the plaintiff's absence out of the kingdom; so that, during such impediment, the time is not computed^c. And, when the debt is conditional, the time does not commence till existence of the condition, or where it is payable at a future day. And in such the plea must not be, (*Non assumpsit infra sex annos*) that the debt was not contracted within six years, but, (*Causa actionis non accrevit infra sex annos*) that the cause of action did not accrue within the six years^d. But a note payable on demand is a present debt, and the statute immediately takes place before any demand made. It is otherwise, where the debt is to arise on a collateral act to be done, which will create no debt till demand^e.

^c 4 and 5 Ann.

^d Vin. ibid.
116, 123.

^e Ibid. 118.

IT is said by some, that the bare owning the debt within the six years, without any actual promise, is sufficient, but that, after the six years, an actual promise is necessary to bring the case out of the statute. But it is acknowledged on all hands, that a new promise, whether before or after the expiring of the six years, will subject the party, unless the limitation is anew incurred by a six years forbearance, after such promise^f.

^f Ibid. 119.

IF a debtor, in debts cut off by the statute of limitation, directs by will "The payment of all his debts in general," this revives the debts so barred, and his executors must pay the same; for the statute is not an extinguishment of the debt, but the same is still subsisting in conscience; and a promise, in such case, is not to be considered as a new one, but as a recontinuance of the old. Yea, the executor's putting out an advertisement in the Gazette, "That all persons, who had any debt owing them from the testator, should come to him and make them out, and the same should be paid," was found good to subject him to the debts barred by the statute^g.

^g Ibid. p. 118, &c.

I HAVE observed above, that, by our law, the short prescriptions, as of bargains about moveables, &c. do not cut off the debt, but only exclude the mean of proof by witnesses, so that the party may still be subjected, upon a proof by his oath, that the debt is owing. Whereas, by the law of England, debts, barred by the statute of limitation, cannot be recovered in equity before the court of chancery, where the defendant makes answer upon oath, more than at common law. And consequently, tho' such debt is said to subsist in conscience, the meaning can only be, that a conscientious debtor will pay it, and that this is a sufficient consideration to support a promise of payment from being regarded as a nude contract. But such promise with

rent, upon a lease in writing, not barred by the statute of limitation.

17. The statute of limitation good against the judgments of a foreign court.

18. While the plaintiff or defendant is beyond sea, or while the condition is pendant, the term of limitation does not run.

19. How far owning the debt, or promise of payment within the six years, or after, will subject the party.

20. Debts cut off by the statute of limitation, understood still to be subsisting in conscience.

21. In what sense are debts, cut off by the statute of limitation, said to subsist in conscience.

with us would be of little or no effect, since it could only be proved by the party's oath, who, in such case, might qualify his oath, that the debt accordingly was paid, whereof he needed no other proof than the quality of his oath; nor could such promise, and much less a general burthen of debts, or an advertisement by the executors, make way for a proof by witnesses, of debts that had fallen under the short prescription.

OUR statute, limiting cautionary obligations to seven years, is of a singular nature; and it may be doubted, whether a promise by word or writing, either before or after the seven years are expired, will subject the cautioner? For answer, I have shown in the foregoing title, that such promise should bind the party for seven years after the promise, as being a recontinuance of the former obligation; in the same manner as by the law of England above mentioned, in the case of debts barred by the statute of limitation.

22. The limitation of popular actions in England, takes place likewise in Scotland.

POPULAR actions, by the law of England, prescribe in two years, as to the king's interest in the forfeiture, and in one year as to the prosecutor's^a, which takes place only, where no time is limited in the acts imposing the penalties. This rule must likewise hold with us, as to British statutes enacting penalties, but mentioning no time within which the action for the same is limited. If an information be brought after the year, on such penal statute, which gives one moiety to the informer, and the other to the king, it is naught only as to the informer. But the party grieved is not within the restraint of such limitation, as to his interest, but may sue in the same manner as before^b.

^a 35 Eliz. c. 5.

23. The statute of limitation not a good plea in the court of admiralty, except for seamen's wages; nor in the spiritual court.

THE statute of limitation James I. is a good plea, not only in courts of law, but likewise in a court of equity, but is not in the court of admiralty; only actions there for seamen's wages must, by special statute, be sued within six years, next after the cause of action shall accrue, and not after^c. Nor is it a good plea in a spiritual court; but this rule must be limited to cases, where the court of admiralty, and spiritual court, proceed according to their own rules, and in matters in which they have cognizance^d.

^b Bac. new abr. (limitation) 505.

^c 4 and 5 Ann. c. 16.

^d Bac. ibid. 412.

24. It is no good plea to avoid the statute of limitation, that there were no courts of justice open.

IT is no plea to avoid the bar of the statute of limitation, that there were no courts, or that the courts of justice were shut^e. And therefore a special statute was necessary, at the revolution, to declare, that the time between the 12th December 1688, when king James departed, till 12th March thereafter, that king William assumed the government, should not be accounted any part of the time, within which any person, by virtue of the statute of limitation, might bring his action^f.

^e 1 Lev. 31. 2 Vent. 192.

^f 1 W. and M.

25. How far the king concluded by statutes of limitation.

IT is a general rule in the law of England, founded in the royal prerogative, *Quod nullum tempus occurrit domino regi*. And therefore the general acts of limitation do not extend to him^g; so that, unless the king be specially mentioned to be concluded by the limitation, it doth not concern him. The same rule obtained in statutes with us, relating to prescription, whether the positive^h, or negativeⁱ.

^g Coke 11. rep. 74. 2. inst. 273.
^h P. 1617. c. 12.
ⁱ P. 1600. c. 14.

A N

A N
I N S T I T U T E
O F T H E
L A W S of S C O T L A N D
I N
C I V I L R I G H T S.

W I T H
O B S E R V A T I O N S upon the Agreement or Diversity between
them, and the L A W S of E N G L A N D, &c.

B O O K III.
Transmission of Rights PERSONAL and REAL.

I HAVE discussed rights both personal and real, as to their constitution and dissolution. I now proceed, according to the method proposed in the entry, to the Transmission of them, either among the living, and by deeds *inter vivos*. viz. the conveyance of them from one to another, executed by the will of the party; or from the subjects to the king, by Confiscations; or from the dead to the living, by Testamentary Settlements and Legal Succession. Of all which I am to discourse in this book; and shall conclude it with the variations made in our feudal holdings and jurisdictions, by the late statutes, greatly to the advantage of this country.

T I T. I.

Assignations and Arrestments.

SECTION I. *Assignations, or Assignments.*

TRANSMISSION of rights among the living is accomplished by Assignations and Dispositions. In the general sense, Assignation or Assignment is applicable to real as well as personal rights, but more particularly to personal; as the term Disposition (of which I am to discourse in the next title) is proper to real rights, either of moveable or heritable subjects, but more especially is applied to heritage. This distinction is most conspicuous in rights proceeding from the king; for moveables and personal rights, that are conveyed by assignation, pass under the privy seal; but heritable rights, which are the proper subject of dispositions, passed, before the

1. Disposition, proper to real rights, and assignation to personal.

union, under the great seal^a, and now under the seal that came in place of it for Scotland.

^a P. 1672.
c. 7. et ibid.
MacKenzie.

2. Assignations, either by the deed of the party, decree of the judge, or act of the law.

ASSIGNATIONS are either by the deeds of parties, and this is what is commonly understood by an assignation; or by the decree of the judge, whereby he decrees the species of goods, or moveable sums of the debtor, to belong to the creditor, who had affected the same by arrestment: this is called a Decree of Furthcoming. By act of the law, executors are, in a manner, assignees to the effects confirmed; as a husband is likewise to the moveables of the wife, by his *jus mariti*. An assignation, in the ordinary sense, is "a deed, whereby one makes over any personal right belonging to him in favour of another;" the granter of the right is termed the Assigner or Cedent, the Receiver, the Assignee or Cessioner.

3. Assignations, either voluntary or necessary; instances of this last.

ASSIGNATIONS, extrajudicially made by the deeds of parties, are either Voluntary or Necessary: the first are such as proceed from the free will of the granter. The other, where the party is compellable in law to make them; as creditors receiving payment out of the price of the lands sold at a roup, before the lords of session, are bound to convey their debts or diligences to the purchaser, with absolute war-randice, to the amount of the sums they receive, for the security of his purchase; or, obtaining payment from a cautioner, must convey their debts to him, for his relief against the principal debtor, and proportionably against the co-cautioners. Of the like kind is the case of a creditor who has a preferable debt upon a subject whereon another has a secondary security: the creditor preferred must convey his debt, and other securities he has on separate subjects, to the creditor postponed, for his relief, he being only accessarily liable to the debt, and, in effect, is purchaser of it; and therefore, according to the rule laid down in the civil law, he is intitled to a conveyance thereof, and of all securities in the creditor's person for the same debt^b, as I have largely shown elsewhere^c.

^b L. 23. ff.
de hæred.
vel act. vend.
^c B. 1. tit. 9.
§ 4.

4. Who may grant assignations; the case of tutors assigning debts due to the pupils, and of persons at the horn making assignations.

ALL persons who have the free administration of their own, or other persons effects, may grant assignations of the same; but in the case of a tutor, or curator assigning a debt due to him by the minor, the assignee may be excluded, till he render an account of his administration; but the assignee may instantly oblige the minor to state his accounts, or remove the objection, by finding caution to the minor for the balance, if any shall be found due to him by the cedent the tutor, after adjusting the accounts^d, as I have observed in another place^e. This is peculiar to the case of minors, and does not extend to assignations granted by factors or other administrators, of debts due to them by their constituents; for such assignee shall obtain decree for the same, unless a ground of compensation be proved on the part of the constituent against the factor; as in the common case among other persons^f. One under civil rebellion, or outlawry, by lying at the horn, may validly assign such rights as fall not under the escheat^g; because, as to those, the donatary has no interest, and the statute, which prohibits assignations by such persons, only concerns the fisk's interest^h. Nor can a tutor assign his pupil's effects for payment of his own debtsⁱ, that being an act of mal-administration; nor indeed

^d Decem. 2.
1679. Cle-
land.
^e B. 1. tit. 7.
§ 40.
^f Jan. 7.
1680. Mac-
Bride.
^g Spotsw. (as-
signations.)
Cuning-
hame.
^h P. 1592.
c. 147.
ⁱ Spotsw.
ibid. Sands.

has

TIT. I. Assignations, or Assignments. 191

has he regularly power to assign, but only to uplift the debts due to the pupil, as I have observed in the title above referred to.

^a P. 1594.
c. 220.

ALL persons may receive assignations that are not disabled: thus, members of the college of justice, or of any other court, by special statute are prohibited to buy lands, or other subjects depending in suit, on pain of deprivation^a. A dependence is, after summons is executed, till decree is recovered; or, if thereafter the same is suspended, it becomes again a dependence from the time of raising the suspension, till it is discussed.

5. Who may receive them; members of court cannot take assignations to things in suit.

^b Hume, dec. 38, and 87.

THE assignation is not completed by executing and delivering it to the assignee, but it must likewise be intimated to the debtor, till which is done, the cedent is not understood in our law to be denuded. Intimation of an assignation, is "the assignee's giving notice of his right to the debtor," which regularly ought to be done, by causing read it to him, and thereon protesting, that the debtor may not pay the debt to any other, upon which he must take instruments, in the hands of a notary, before two witnesses, who must sign the instrument when extended by the notary. Any onerous deed, executed by the cedent before intimation, will prejudice the assignee, and a second assignation, for a valuable consideration, first intimated, will be preferable. And an arrestment, used in the debtor's hands; or, in case of the cedent's death, another confirming the debt assigned, as executor creditor to him, will exclude the assignee, whose assignation was not intimated before the arrestment or confirmation^b; the one being an Authoritive, and the other a Judicial Act, needing no intimation.

6. Intimation necessary to complete assignations.

^c Feb. 2. 1676. Cultie.

^d Hareus (assignation) 1685. Hessefide.

^e July 12. 1677. Boyer.

ASSIGNATIONS, duly intimated, denude the cedent of all right that stood in his person, and collateral securities pass therewith, tho' not specially mentioned^c. When a debtor makes his creditor assignee to a bond, and causes it to be intimated, yet, if he retain the writings in his own hand, he is not understood divested, since the assignation is still in his power, and which he may destroy^d. The case is otherwise of a bond taken by a debtor in the name of his creditor^e; for then the only right to the bond is in the person of the creditor, and cannot be vacated without destroying the bond and taking a new one, which cannot be done to the prejudice of the creditor, in whom the right is vested.

7. The effect of an assignation intimated. The case of a debtor's making an assignation to his creditor, and intimating it, without delivering the same.

^f July 11. 1630. Leighton.

^g L. 174. § 1. ff. de reg. jur.

^h P. 1540. c. 105.

WHERE the right assigned is only a personal obligation, for a sum of money or the like, it passes in the same manner qualified, as it was in the cedent; and therefore discharges, receipts, or even backbonds by the cedent, or other exceptions against him, will affect the right in prejudice of the assignee, *qui utitur jure auctoris*^f, and in this respect the rule in the civil law, *Non debeo melioris conditionis esse quam auctor meus*^g, That I cannot be in a better case than my author, takes place, tho' it does not universally hold in our law, as shall afterwards appear. And, for the same reason, if the second assignation be gratuitous, tho' first intimated, it must yield preference to the first; for the objection that lay against the cedent, of granting double rights^h, is good against the second gratuitous assignee, without distinction whether

8. In personal obligations, assignees subject to all the exceptions that lay against their authors; a second gratuitous right, tho' first intimated, must yield to the first assignation.

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ther the first assignation was gratuitous or not, since the first assignee is creditor to the cedent, by the express or implied warrandice in the right^a; and no creditor can be prejudiced by a subsequent gratuitous deed, in relation to the same subject, which is manifestly fraudulent.

^a July 15.
1675. Alexander.

9. Assignations to incomplete real rights, what their effect.

AN assignation to an incomplete real right, or rather a personal right of lands, as to a disposition before infeftment taken by the disponee, is not perfected by intimation, for which there are not proper terms. It is only the assignee's completing the feudal right of the lands in his own person, that can effectually denude the disponee. And therefore a second assignee, first infeft on the disposition assigned, is preferable to the prior assignee who did not obtain himself infeft thereon^b. If it were otherwise, our land-rights would be rendered quite unsecure: for the purchaser, on the faith of the records from one who stands infeft, would not be safe, unless, in the case supposed, his author's infeftment were preferable to the first assignation. And the case is the same as to any backbond granted by the party having a personal right to lands, that the same would not be regarded, in a question with a party who acquires right to the personal deed or disposition, and perfects the same by infeftment in his own person. The same rule will hold in the case of an adjudger of such personal right, completing the same in his person by charter and feisin, in competition with a prior assignation to the same, whose right remained still personal. But what if none of the assignees from him, who is vested with the personal right, has completed the same by infeftment thereon? I should think that the first assignment of the same is preferable; for where the rights are of equal degree as to their completion, the rule is, *Prior tempore potior jure*, The first in time is preferable. If the second assignee know of the first, his perfecting the right by infeftment will not avail him; for he is accessory to the party's granting double rights, which not only is a ground for annulling the second as fraudulent, but likewise subjects the offenders, and all accessories, to the guilt of stellationate^c.

^b June 26.
1676. Brown.
June 27.
1737. Bell
contra Garthshore.

10. Bills of exchange, assignable by simple indorsement; the effect of assignments to the obligor.

BILLS of exchange are fully assigned by indorsements on the back of the bill, Ordering the acceptor to pay the contents to another, and such indorsements need no intimation; and while the bills are current, they are not liable to the first creditor's deeds, or intermediate indorsee's, of which I have discoursed fully elsewhere^d. Thus, likewise, assignations of claims, to the parties subject thereto, need no intimation; for they have the effect of a discharge, and it were absurd that one should intimate a right to himself^e.

^c P. 1540.
c. 105.
P. 1592.
c. 142.

^d Lib. 1. tit. 13.

^e July 27.
1673. Montgomery.
Dec. 14.
1676. Earl of Argyle.

11. Translation and retrocession, what.

THE assignee may assign over his right to another, which second assignation is termed a Translation, and is governed by the same rules with the first assignment. And if the right is returned to the cedent, the conveyance is termed a Retrocession or Reposition; and if the assignee had intimated the right in his person, the retrocession must likewise be intimated, but otherwise not^f.

^f Decem. 2.
1674. Craig.

12. Intimation how regularly made,

INTIMATION of an assignation ought regularly to be made by the assignee, or his procurator having the same, and intimating it to the debtor,

debtor, as above. The bare possession of the assignation is a sufficient implied authority to intimate it, without any letter of attorney, or express commission for that purpose. But any suit upon the assignation, or diligence by horning, at the instance of the assignee against the debtor, or any writing under the debtor's hand, acknowledging the assignee's right, is sufficient in place of a formal intimation^a. However, the debtor's private knowledge will not avail^b; for that can have no effect upon the completing of the right.

and what equivalents supply it.

^a Jan. 22.
1630. Anonymus. Dec.
11. 1674.
Elphinstone.
^b June 15.
1624. Adamson. March
14. 1626.
laird of Wigham.
^c D. decif.
Elphinstone.
Dirlt. decif.
201.

THE assignee's shewing the assignation to the debtor, and his promise of payment, will stand in place of intimation, even in competitions; provided such acceptance of the assignment is proved by the debtor's writing, or by the competitor's oath of knowledge, but otherwise it will have no effect^c. And if the competitor be preferred, the debtor is free of his promise, and only liable in single payment, viz. to the party preferred, and not in a second payment to the assignee on account of his promise; because the promise implied a condition that the assignee had good right to the debt. But if there had been a transaction or undertaking of the hazard on the part of the debtor, he must make good his bargain, tho' he may thus be subject to double payment.

13. What if the debtor has promised payment to the assignee, and another is preferred.

If the debtor sign consenter to the assignation, it not only supplies an intimation, since there can be no occasion to notify to one a deed to which he is privy, but likewise excludes the debtor from all objections against the debt, in the same manner as in the case of ordinary delegation: the only difference is, that the debtor may be taken consenter to the assignment, tho' the cedent is not debtor to the assignee, which is always requisite in a proper delegation.

14. The case of the debtor's signing consenter to the assignation.

AN assignation may be intimated in part, as when action is intended, at the assignee's instance, concerning some controverted articles of the subjects assigned; or, possibly, it has been neglected to be read to the debtor as to some of the particulars^d. In such case, tho' the debtor, perhaps, might know the whole contents of the assignation, yet it will be esteemed as intimated only in respect to those particulars to which the process or instrument of intimation related.

15. May an assignation be intimated only in part.

^d Nov. ult.
1662. Murray.

ASSIGNMENTS to reversions need no intimation, if duly registered in the record of reversions, conform to the statute, that register being for intimation^e. But, in some respect, the registering such assignation will not signify in place of intimation; for it will not exclude the wadsetter's *bona fide* accepting payment from the reverser, and thereon making a grant of redemption in his favour. Judicial assignations, by adjudications of heritable bonds belonging to the debtor, need no intimations, the solemnity of the process and decree being sufficient. But it is adviseable to intimate them, to prevent *bona fide* payment, the intent of intimation being not only to complete the right, as in most cases, but likewise to put the party in *mala fide* to pay; this last is expedient, where the former is not necessary. Marriage is likewise a legal assignation to the husband of such things as fall under the *jus mariti*, and needs no intimation, being presumed notorious. Assignment to mails and duties may be intimated, not

16. Intimation expedient to prevent bona fide payment, where it is not a necessary solemnity to complete the right.

^e Decem. 5.
1665. Begg.

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only by formal instrument of intimation to the tenants, but likewise by a suit against them, or their entring into payment; and to a life-rent-infestment, and a tack, by possession ^a.

^a Dirlt. decis. 123.

17. The case of bonds, or other rights, blank in the creditor's or receiver's name.

OF old it was customary with us to take bonds, and other rights, blank in the creditor's or receiver's name; so that whoever came to be possessed of such writings, and to fill up his own name in them, was considered as the original receiver of the same, and so needed no intimation; because the right of no other did appear. But these giving great occasion of fraud, are prohibited by statute ^b, except as to indorsements to bills of exchange, or of the notes of any trading company. Such blank writings were found good to the persons whose names were afterwards filled up therein, even tho' they had not been born at the date of the same ^c.

^b P. 1696. c. 25.

^c Dirlt. decis. 213.

18. In what cases blank writings presumed delivered at the time of granting them.

WHERE writings before that statute contain a clause, dispensing with the delivery, and appear, by ocular inspection, to have been originally blank in the creditor's or disponent's name, the party claiming thereon must prove that they were filled up or delivered in *liege poustie*, or before the granter was on death-bed, in a question with the heir ^d; for otherwise the law of death-bed might be easily eluded: but, in other blank writings, not containing such dispensing clause, the delivery; according to the general rule, as to all deeds out of the granter's hand, is presumed to have been at the date which rendered them effectual in favour of the haver; but a blank writing undelivered is good for nothing, there being no person that can claim thereon ^e. I have discoursed a little on blank writings elsewhere ^f, to which I shall add no farther.

^d July 17. 1736. Keith of Broxy. July 9. 1676. Gordon.

^e Jan 17. 1677. lord Banff. Nov. 29. 1679. Boyn. June 25. 1746. Ruddiman, observ. by Falc.

^f B. 1. tit. 11. § 25.

^g June 24. 1669. Stuart.

^h Falc. June 28. 1748. Neil.

ⁱ Newton decis. 55.

^k B. 2. tit. 9.

19. What rights may be assigned.

ALL personal rights may be assigned, tho' they mention not assignees ^g; unless they are incommunicable from the nature of the thing, or made intirely personal to the creditor, as aliments. Reversions likewise are unassignable, unless they bear to assignees, these being strictly to be interpreted ^h; provided it appear, from the tenor of the deeds, that it was intended they should be personal. In some cases, where the right is taken to the person himself, expressly excluding his assignees, it may, notwithstanding, be assigned, for onerous and necessary causes; as for maintenance furnished to the cedent, but cannot gratuitously, or without necessity ⁱ. The rule is, That rights transmissible to heirs and successors, are assignable, unless it is otherwise provided. As to assignation of tacks and rentals, there is somewhat special, of which I have treated in the proper place ^k.

20. How far rights, burdened with a substitution, may be assigned.

As one's right may be with a clause, expressly excluding assignees, so, from the nature of it, voluntary gratuitous assignation of the same may implicitly be prohibited. Thus, mutual substitutions are frequent in bonds of provision to children, that, failing the one before marriage, or any other like condition, it should go to the other; or where there is a proviso, that, failing the child, the same should return to the granter, or his heirs ^l; for in these cases the right is qualified, so that, without necessity, the substitute should not be prejudiced, the interest of the other children, or the heir, being in the eye of the granter. But the party may uplift or assign for onerous,

^l Jan 5. 1678. Innes. Jan. 31. 1679. Drummond. Edg. Feb. 6. 1724. Moffats.

onerous, or even rational causes; and sometimes neither they, nor their assignees, will be bound to find caution to make the sum good, on the event's happening^a, so that the substitution may be quite evacuated by such deed. And ordinary substitutions in bonds may be frustrated, even by gratuitous deeds at pleasure, the intention of such being only that the substitute shall take the right in place of the institute's heir or executor, in the same manner as in the case of a naked destination in lands.

^a June 12.
1707. Mac-
Doual.

SOMETIMES one who, in appearance, is only a liferenter, may uplift or assign at freedom. This is the case, where a bond is taken or assigned "to one, he being in life, and after his death to another." The institute may, at pleasure, freely receive payment, or transfer the right; but, if the sum remains due at his death, the bygone interest falls to his executors, and the principal sum to the substitute, who is a conditional creditor, *viz.* in case the other do not uplift or dispose the same^b.

^b Jan. 26.
1711. lord
Elibank.

AN heritable bond by infeftment, or the sum in a wadset, whereon seisin is taken, cannot be assigned, but must be conveyed by disposition, as a right of lands. But, if such security is made moveable, by requisition or charge, the same is assignable^c; unless it contain a clause, that, by personal diligence, the heritable security shall not be loosed. And however, it is advisable, to take a disposition of the heritable right, even tho' it bear no such clause; for otherwise, if the assignee should be disposed to return to the heritable security, he cannot get himself infeft, nor can he renounce the right on redemption.

^c Feb. 24.
1624. Do-
naldson.

IN rights constituted by infeftment, the mails and duties, or rents, may be assigned, and the assignee's right to the rents stands good, while the right of the lands remains with the cedent, but no longer^d. And an assignation of rents made by the ancestor subsists only so long as the right of the lands is in the person of the heir, who is liable, by the warrandice, to make it good; but the onerous singular successor in the lands is not concerned in either case with the personal deeds of his author, which an assignation to the rents only is.

^d Feb. 6.
1666. Wil-
son. Hume
decif. 81.
Nov. 28.
1635. Mori-
son. Nov.
1732. Bailey.
Jan. 12.
1734. Earl
Loudon.

A LIFERENT right, tho' by infeftment, may, to a certain effect, be assigned over. But, since it cannot be transmitted by a new infeftment, the cedent's life must be the rule for its termination; and therefore the right of liferent is not properly assigned, or stated in the assignee's person, but only a power of receiving the profits of the subject, during the cedent's life, is made over to him; which, however, being duly intimated, will be effectual against all the subsequent deeds of the cedent.

^e Feb. 5.
1662. Pitfod-
dels. June 16.
1665.
Wright.
June 13.
1666. Jack.
July 23.
1707. Bur-
ton.

IT is the effect of an assignation duly intimated, that the cedent's oath cannot be taken in prejudice of the assignee; because the cedent being divested, his oath cannot affect the right: unless the assignation was in trust, or gratuitous, or the matter rendered litigious before intimation^e. But litigiosity will not be inferred from a past bill of suspension not intimated, nor from a summons of reduction executed

21. Bonds payable to one, and failing of him to another, may be assigned by the first named.

22. An heritable bond or wadset, on which infeftment hath followed, how assignable.

23. In rights constituted by infeftment, how far an assignation to the rents subsists.

24. How far a liferent of lands assignable.

25. The cedent's oath, when good against the assignee.

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cuted against the creditor, which was suffered to fall, by not being called within the year^a.

26. The effect of the assignee's intimating after the cedent's death.

AN assignee may prosecute his right after the cedent's death, tho' he had not intimated it in the cedent's life, without confirmation, if the assignation is special^b: but in general assignments, confirmation is necessary, at least before extract of the decree, and intimation of such general right, after the granter's death, has no effect^c.

^a July 23.
1707. Burton. Jan. 21.
1709. Houston.

^b Act 26.
P. 1690.

^c Hume decis.
37.

27. Assignations to adjudications, how qualified by backbonds.

APPRISINGS or adjudications, and assignations thereto, are qualified by the backbonds of authors, even in questions with an onerous purchaser, during the legal; as likewise after it is expired, if the matter was rendered litigious before infestment, in the same manner as in the case of irredeemable dispositions. But, after the assignee is infest upon an expired adjudication, his author's backbond will not affect him, for otherwise land-rights would be unsecure^d, of which I shall have occasion to speak more fully hereafter^e. I shall only here observe, that an adjudger, or his assignee, under backbond to denude, cannot refuse to do it, on pretence of a bond due to him by the intruster; for he ought to impliment the trust, the right being a kind of depositum in his person; and the personal extraneous claim can be no bar to the performance.

^d Nov. 21.
1673. Brown. July 6.
1676. Gordon.
^e Inf. tit. 2.

^f Fount.
Feb. 23.
1697. Scot.

28. Warrantice in assignations, how far extended.

WARRANTICE in assignations to bonds, which are *nomina debitorum*, is ordinarily only from the fact and deed of the cedent, and his authors. But even when it is absolute "At all hands, and against all "deadly," it imports no more than *Debitum subesse*, that it is a true debt^g, but not *debitorem solvendo esse*, that the debtor is solvent; which may be done by warranting that the debt shall be effectual^h. But in assignments to dispositions, or other incomplete real rights, absolute warrantice imports the same thing as if infestment had followed upon them. And absolute warrantice, in assignations to apprisings and adjudications, implies that the debts are real, and the diligences legally ledⁱ. I have discoursed largely of warrantice in another place^k.

^g Nov. 24.
1671. Barclay.
^h Feb. 7.
1678. Stewart.

ⁱ Dirl. decis.
44.
^k B. 2. tit. 3.

29. What if the assignee sue in the cedent's name.

AN assignee may use diligence in the cedent's name. But, in such case, any lawful defence may be proved by the cedent's oath, unless the assignation was formerly intimated; for the production of the assignment, in such process, will not exclude the cedent's oath; because, tho' that imports an intimation, the matter was rendered litigious before, by intending such action^l.

^l Feb. 12.
1678. Fraser.

SECTION II. Arrestments, and Decrees of Forthcoming.

30. Judicial assignations, what: arrestment of criminals, or of corns sown upon controverted ground.

JUDICIAL assignations are likewise either of moveables, by arrestment and decree of forthcoming, whereof I am now to discourse; or of heritable rights by apprising or adjudication, of which in the next title. An arrestment is a Writ, or Letters in the king's name, under the signet or the precept of an inferior judge, duly executed, ordaining the goods or debts arrested to remain in the same state, till payment or caution is found to the arrester, or other things be done to him, specially mentioned in the letters or precept. It is sometimes applicable

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a P. 1487.
c. 99.
P. 1528. c. 5.

applicable to the arresting or securing persons as criminals, in order to trial ^a. And likewise things in dispute may be arrested, till the question of right be determined, as corns sown upon controverted ground: however, the party against whom it is used may intermeddle with the same, on finding caution to be answerable in the event; but otherwise he will be liable to breach of arrestment on contravention. But arrestment is ordinarily used by creditors, of their debtor's effects, to secure them for their payment.

b Hume (forum compe-
tens) July
26. 1733.
Couts.

c June 23.
1710. Dal-
rymple.

THE warrant of arrestment, is either a writ in the king's name, by letters under the signet, and is frequently, of course, contained in letters of horning or inhibition. This extends not only over the whole kingdom, but likewise may contain warrant to arrest at the market-cross of Edinburgh, pier and shore of Leith, in the hands of persons abroad, in order to reach their effects, in this kingdom, on a forthcoming. But is inept as to securing the debtor's effects in a foreign country ^b. Or a precept from an inferior court, which can only be used within the territory of the judge who grants it; but if the party, in whose hands it is laid, change his domicile, nothing hinders it from being prosecuted before the judge where he resides at the time ^c. One confirming a debt cannot charge or arrest upon a horning raised in the deceased's name. As neither can an assignee execute a charge, at his own instance, upon a horning, in the name of his cedent. But they must take out new hornings in their own names; for a messenger cannot vary from the stile of the letters or writ, which is his warrant. But the registred bond, in the name of the deceased or cedent, is sufficient warrant for such new horning. Process of forthcoming may be carried on before the court of session, not only upon arrestments laid in virtue of their own authority, by letters under the signet, but likewise upon arrestments by inferior judges.

31. The war-
rant of ar-
restment,
what.

d Jan. 10.
1624. laird
Innerweck.

e Newt. decif.
100.

f Jan. 18.
1709. Do-
naldson.
Hope (arrest-
ment) Muir-
head.
g July 12.
1628. Ben-
net. Marcus
(arrestment)
Nov. 1687.
Robertson.

REGULARLY arrestment is made in the hands of those who have in possession the goods of the arrester's debtor, or are debtors to him; but it is sometimes used in the hands of the common debtor himself ^d. This seems irregular, and will not be sustained in prejudice of purchasers from him; because, as inhibition does not affect moveables, so neither can arrestment laid in the debtor's own hands, that being destructive to commerce. But a particular subject may be arrested in the common debtor's hands, in order to subject him to the breach of arrestment, in case he incur it ^e, and the regular way is to point such goods: but the maxim, that *Mobilia non habent sequelam*, will protect *bona fide* purchasers. Tho' arrestment imposes a kind of real burthen, and is not simply a personal prohibition; yet the *ipsa corpora* arrested may be pointed; and the heir may warrantably pay or deliver the subject arrested in the ancestor's hands, except in the case hereafter observed.

32. Arrest-
ment in the
common
debtor's
hand, how
far sustained.
Is arrestment
a real bur-
then.

ARRESTMENT may be laid in the hands of a factor, as debtor to his constituent the common debtor, but cannot in the hands of the factor of the debtor to the common debtor; because he is only debtor to his own constituent, and not to the common debtor ^f: nor in the hands of tutors or curators, but in the hands of the minor only: however, they must be cited with him in the forthcoming for their interest ^g.

33. Arrest-
ment in a
factor's hand,
how far
good.

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34. The ground of arrestment, what; and how arrestments prescribe.

THE ground of arrestment is either a decree against the debtor, or a depending action. And it prescribes in five years after it is laid, where it is by virtue of a decree, either of registration, or in an ordinary action, and in five years after decree is recovered on the dependence, where a depending action is the ground of it. And, in the first case, it cannot be loosed on caution, unless the decree was suspended before the arrestment was laid; for an after-suspension will not have that effect, except the decree be turned to a libel^a, but in the other it may be loosed, even after decree hath proceeded^b. In this case, an arrestment on an unregistered bond, is equal to one upon a dependence. Whether the debt arrested for is heritable or moveable, does not alter the case, if there is a personal obligation to pay. And tho' a general adjudication has proceeded, that being only a collateral security, the creditor, who is not in possession of the lands, may still insist on diligence for payment, either personally against the debtor, or really, by arresting or poinding his effects: in this case he passes from the accumulations, those being only a burthen on the subjects adjudged, and can only be recovered, when payment is made effectual thereout^c. But in special adjudications, the adjudger, being put in possession, cannot use other diligence for recovering his debt, since he has accepted the subject in payment conditionally, viz. in case the debtor do not redeem the same within five years.

^a June 30.
1675. Murray. Nov. 20.
1675. Warden. Hume (arrestment)
July 7. 1733. Martin.
^b June 9.
1677. Sibbald.

^c July 1734. captain Chalmers contra Colsfield.

35. What subjects may be arrested.

ALL moveables belonging to the debtor, in other persons hands, and moveable debts owing to him, are the proper subjects of arrestments. And heritable bonds, before infeftment proceeds on them, are arrestable by statute^d, which had been enacted before by one of the rescinded parliaments^e. The principal sum being arrested, the interest that becomes due thereafter follows of course, and so must be made forthcoming, as well as the principal sum and bygones due at the time of the arrestment. But, if apprising or adjudication has proceeded on a bond, it is not arrestable. And if infeftment is taken on an heritable bond, it cannot be arrested; nor a sum in a wadset; till it is made moveable by requisition or charge, or by an order of redemption, and declarator thereon^f; but the bygone rents, or annualrents may. Conditional bonds may be arrested; for the condition, when it exists, is drawn back to the date of the bonds, according to the proper nature of conditions.

^d P. 1661.
c. 51.
^e P. 1644.
c. 42.

^f June 21.
1626. Murray. Feb. 22.
1666. Lockhart.

BYGONE mails and duties of lands, and bygone annualrents due by infeftment, may, as just said, be arrested. And even the current term in money-rent payable termly, or current year's rent in money or victual, when payable yearly, is arrestable^g; and, in case the debtor is not denuded of the right to the lands, or infeftment of annualrent before the term of payment, the current rent or annualrent will be decreed to be made forthcoming at the term^h. But arrestment extends not to future debts, nor to alimentary fundsⁱ.

^g March 24.
1624. Brown.

^h Feb. 21.
1624. Brown.
ⁱ March 27.
1622. West-nisbit. Jan. 13. 1628.
Halkerton.
July 9. 1668.
Boog.

WHERE a wife liferents lands, or annualrents, by a former husband, which falls under the present husband's *jus mariti*, his creditors can only affect by arrestment the bygones. But, strictly speaking, not the current term, because the same is not due to the husband till the term elapses; and, if the marriage dissolve before, it never becomes

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comes due to him; so that neither *dies cessit* nor *venit* till the term: however, the court of session, for common expediency found, in such case, the current term arrestable^a; and indeed it may be considered as a conditional debt. But the *jus mariti* itself, as to time coming, can only be carried by adjudication.

^a July 27.
1673. creditors of Scot.
Fount. July
31. 1705.
Corse. Hume
(arrestment)
Jan. 19.
1739. creditors of Clunes.

^b Jan. 20.
1681. Riddel.

^c Decem. 22.
1738. Earl
of Aberdeen.

AN arrestment does not expire by the death of the creditor arrester, but may be prosecuted by the executor, or other person that makes up title to the ground of debt. Nor by the death of the common debtor, whose effects are arrested, but may be insisted in after his death, without constituting the debt against his representatives, if it was established by decree against himself, but only calling them in the process of forthcoming, for their interest, as the debtor himself must have been called^b; and, if he die during the litispence, incident diligence will be granted for calling his representatives. But being a prohibitory diligence only, it in some measure expires by the death of the person in whose hands it was made, before decree of forthcoming, in respect that the heir may lawfully pay, without regard to the arrestment, before he is interpellated by reviving the action against him. But, if the debt arrested can be proved by writing, the creditor may follow out his forthcoming against the heir: and the lords of session have lately found such arrestment, in a deceased person's hands, preferable to one thereafter laid in the hands of his heir^c. Thus, while the subject is *in medio*, an arrestment is understood to be *nexus realis*, a real lien, with respect to subsequent arrestments; and which is most reasonable, since it were absurd, that the party's death should frustrate the creditor's diligence. Inhibitions indeed operate not, after the death of the person inhibited, against his heir; because an inhibition is simply a prohibitory diligence: whereas an arrestment is a kind of real burthen or inchoate diligence affecting the subject, which may be prosecuted to a decree of forthcoming, whereby the same may be adjudged to the arrester, which is not the case of an inhibition.

36. Does arrestment expire by the death of the creditor, common debtor, or of him in whose hands it is laid.

^d June 13.
1675. Hamilton.

^e P. 1617.
c. 17. June 9.
1677. Sibbald. Dirl.
decif. 300.
July 31. 1705.
MacPherson.

^f June 21.
1626. lord
Balmerino.
Feb. 7. 1665.
Graham. Gil-
mor decif.
125.

ARRESTMENTS, laid in virtue of registred bonds, or decrees for liquid sums, not suspended, cannot be loosed, *Otherwise than upon payment or consignation of the sum*^d. But those upon a dependence, even after decrees follow, or on unregistred bonds, or even upon decrees after suspension, where, at discussing, they are turned into libels, or when they are for things illiquid, or for sums whereof the term of payment is uncertain, may be loosed, on caution found in the judge's court-books, by whose authority they were made^e. But juratory caution will not be received. After the arrestment is loosed, the person, in whose hands it was used, may safely pay the debt to his creditor, or deliver up the goods arrested; but, if they are still in his hands, he may be pursued to make them forthcoming, and that even in preference to an assignee. But otherwise only the cautioner may be sued, who will be liable to the extent of the subject arrested, to be ascertained by the person's oath or writing, in whose hands it was used^f.

37. Arrestment, when loosable; and what the effect of loosing it.

THE design of arrestments is, that the subject may remain to be made forthcoming to the arrester for his payment, by decree for that purpose. Hence, no action of forthcoming can be sued, till the debt

38. Process of forthcoming, when may it be sued.

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is established and liquidated by decree against the common debtor, or his heir, a forthcoming being an executorial diligence^a. In this action of forthcoming, the common debtor must be called for his interest. And, if the debt was suspended, he must repeat in this process his reasons of suspension, or other objections against it, for the suspension needs not be otherwise discussed^b; which is justly introduced to prevent multiplying suits.

^a Dir. decif. 53.

^b Jan. 25. 1642. Stirling.

39. A decree of forthcoming, what.

A DECREE of forthcoming is "A judicial assignment of the subject arrested to the arrester;" but it is only a collateral security, so that he may make use of other means of diligence for his payment, if he pleases; but then he must assign his decree to those whom he thereby prejudices^c. The extent of the subject arrested is usually proved by the defender's oath; but tho' that be negative, it will not prejudice the common debtor's interest, if there is writing to vouch the debt^d, such oath not being given upon his reference. And, if the arrester pleases, he needs not refer the matter to the defender's oath, but may, by an incident diligence, recover the writing, which is the evidence of the debt. But such writing may be taken off by proving payment, or any other objection against it by the common debtor's oath, unless he is bankrupt^e.

^c March 6. 1628. Nicol. Jan. 9. 1710. Elifes.

^d July 23. 1707. Kedzaw.

^e Feb. 20. 1711. Horn. Hume decif. 62.

SECTION III. *Competition among Assignees and Arresters, or them and other Creditors.*

40. The rules of preference between assignees, and betwixt them and arresters, and arresters among themselves.

THE rule of preference among assignees is, according to the priority of the intimations. Between an assignee and arrester, by the date of the intimation, and execution of the arrestment; but a posterior assignation is preferable, where the ground of the arrestment has not *parata executio*, as being on a depending action still undiscuss. But it is thought, that such preference ought only to be *in hoc statu*, the assignee finding caution to make good the sums to the arrester, if he shall recover a decree upon the dependence, as in the like case of an executor-creditor competing with such arrester, as after mentioned, provided the arrester prosecutes his diligence vigorously. Among arresters, the preference is regulated according to the date of their respective executions^f; and even the priority of hours is considered, in manner after related^g.

^f Jan. 13. 1629. Finlayson. July 4. 1661. baillie Gilmor decif. 1. ^g Feb. 26. 1745. Innes.

OF old, arrestment on a decree was preferable to a prior one upon a dependence, and one laid for a debt, of which the term of payment was not come, or upon a debt before the term of payment thereof, behoved to yield to a posterior arrester, whose term of payment was past, or who arrested the debt after the term of payment^h. But now the simple rule of preference is, that the first arrester is preferable, *Prior tempore, potior jure*, if, at the time of the competition, all the debts are equally exigible, and have *parata executio*ⁱ. Thus our law is reduced to a very plain rule on this head, and all parties have the benefit of their diligences, and many fruitless disputes are prevented.

^h Jan. 23. 1673. Mader. July 17. 1678. Pitmedden. ⁱ Hume decif. 100. June 17. 1710. Brodie.

41. Parties may compare for their interest.

WHERE the subject arrested is brought into judgment, all others who have affected it may compare for their interest, and will be preferred,

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ferred, on production of their grounds of debt and diligence, without any suit at their own instance. This is justly introduced into our forms, for avoiding multiplicity of pleas, the execution of justice being thereby expeditiously obtained.

IF the precise time or hour is mentioned in the intimations or executions, where divers arrestments are used, or assignations to the same debts are intimated on the same day, the preference is thereby determined; provided there is such distance of time, that the notary or messenger could not be in a mistake, If the one bears the hour, it is preferred to the other that mentions no hour ^a; because it might have been the last hour of the day. If neither mention hours, all those of the same day come in *pari passu*; nor will any other proof than the instrument or execution be received, for proving the precise period of the time ^b.

^a Jan 30.
1629. Davidson. Feb.
26. 1745. Jones.

^b June 28.
1705. Suitie.

42. The case where arrestments, or intimations of assignations, bear date the same day.

THO' the date of the arrestments is the common rule of preference, yet, if the posterior arrester has first recovered decree of forthcoming, he will be preferred, if the other was *in mora*, by delaying to insist or prosecute his action; for, *Jura vigilantibus subveniunt* ^c, the law gives its aid to the vigilant.

^c Nov. 23.
1667. Montgomery.

43. What if the second arrester has recovered the first decree of forthcoming.

ONE who has arrested, or charged the debtor with horning, may take an assignment, to subjects belonging to the debtor, for his payment; nor is he in any hazard at the hands of other creditors posterior to him in diligence, tho' the debtor was insolvent at the time of the assignation, on the act 1621 ^d; because it was no voluntary deed, but only the arrestment or charge did thereby obtain its full effect, and prevented the creditor's farther proceeding in diligence, by decree of forthcoming, pointing the debtor's effects, or personal execution.

^d Nov. 20.
1677. bishop of Glasgow.
July 5. 1673. Birnie.

44. The case of a creditor who had arrested or charged, his obtaining assignment from the debtor.

OF old, an assignee by an executor, tho' intimating his right, carried the subject only in case the executor, or the assignee in his right, during the executor's life, had executed the testament by sentence against the debtor; for otherwise the executor's title did fall, and, with it, the assignation by his death, and the right accrued to the executors, *ad non executi*, of the first deceased ^e. This was the rule formerly. But now, since necessity of executing the testament, in order to establish the right in the executor's person, is taken off, assignments by an executor are in the same case as other assignations, in respect to the transmission of the right, without regard to the executor's being dead or alive at the time of the assignee's recovering decree ^f. But the creditors of the deceased, or others radically interested in the executry, will be preferred to the assignee, unless the cedent was an executor creditor himself ^g; because other executors are only as fiduciaries or trustees, and their assignees can be in no better case than they.

^e Nov. 24.
1674. Busbie.

45. How far assignations by executors good.

^f P. 1690.
c. 26.
P. 1693.
c. 15.
^g Decem. 16.
1674. L. Kelhead.
Decem. 17.
1675. creditors of Merton.

WHERE the cedent retains the assignation to his creditor in his own hand, but had intimated it, such assignee cannot be preferable to an arrestment, subsequent to the intimation, laid in the hands of the debtor in the bond, at the instance of another creditor of the cedent.

46. What if a debtor make an assignment to his creditor, and intimate

it, but still retain the same in his own hand.

dent. For, since the intimation is only of an undelivered deed, and both are still retained by the granter, they are in his power, and, consequently, the assignee can found no preference thereon; and therefore the arrester, tho' subsequent, must be preferred^a: and, to authorise such proceeding in a debtor, would seem to countenance his partial favour to one creditor, to the prejudice of others.

^a Marcus (assignation)
1685. Falconer.

47. The case of a creditor of a person deceased, assigning his debt to a debtor of the deceased.

THE assignee is in the same case, and no better than the cedent, and therefore a creditor of a person deceased, assigning his debt to the debtor of the deceased, the assignee will not have compensation upon the debt assigned, but will only draw such share of the deceased's effects, as the cedent could, according to his diligence in affecting the same^b; because otherwise the cedent might obtain payment of his whole debt by such compensation, to the prejudice of other creditors who had used diligence, when perhaps he could get nothing of his debt, had it not been assigned, and therefore the assignation is justly disregarded. This I had occasion to touch upon elsewhere^c.

^b Feb. 8.
1662. Crawford. Feb. 14.
1666. children of Mosmill.

^c B. 1. tit. 24.
§ 31.

48. The assignee, by a donatary, subject to his backbond, granted thereafter at the gift's passing the seals.

AND, for the like reason, an assignee, constituted by a donatary, to a gift from the crown, of non-entry, or other grant intended to be under backbond for the behoof of another party, before the gift was expedited in the exchequer, is subject to the backbond, granted thereafter by the cedent, at the gift's passing the seals^d; because the gift, under the king's hand, is not complete till it is past in exchequer, and which must be done in the donatary's own name, who cannot evacuate his backbond by such premature assignation; nor could the assignee, had he been original donatary, have obtained the gift to be past on other terms.

^d Jan. 31.
1666. Dallas.

49. Competition between special assignees or arresters, and executors creditors.

OF old, assignations could not be perfected by intimation after the cedent's death; nor could an assignation, not intimated in the cedent's life, found diligence by horning, poinding, arrestment, apprising, or adjudication, till decree of transference *Active* against the representatives of the cedent was obtained at the assignee's instance^e. But this is rectified by the statute that takes away transferences *active*^f; and by the other act, which, in the case of special assignations, tho' not intimated in the cedent's life, authorises all diligence at the assignee's instance, without necessity of any previous decree or confirmation^g. By this act 1690, the competition of creditors is declared to proceed, conform to the rights and diligences, as before the statute. Wherefore, an assignee, whose right was not perfected by intimation in the cedent's life, must yield to an executor creditor confirming the subject assigned, before the assignation is intimated^h, as before; because the executor creditor has the first complete right. But if the assignee had either obtained decree against the debtor's representatives, or they had acknowledged the right, by granting bond of corroboration, or making payment of part of the debt to the assignee, before confirmation of the executor creditor, the assignee, tho' his right was not intimated in the cedent's life, is preferable to the executor creditor; because his right is first completed, and such was the law, even before the statute 1690ⁱ: so that all that this statute

^e Jan. 23,
27. Feb. 3.
1624. Stevenson.
^f P. 1693.
c. 15.

^g P. 1690.
c. 26.

^h Hume decif. 87.

ⁱ July 27.
1669. Redpath.

has

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has done is to warrant a more summary completing the right by intimation.

AN arrester in the common debtor's life is preferable to an executor creditor. And if it was upon a dependence, and a decree not recovered at the time of the competition, the executor creditor will only be preferred *in hoc statu*, finding caution to restore to the arrester, if he shall obtain decree; because the subject can only pass to the executor, tho' creditor, as it stood affected in the deceased's person by the arrestment ^a.

^a Jan. 20.
1681. Riddel.
July 20.
1732. Grawfurd.

DEBTS due to a person deceased cannot be arrested by his creditors after his death, while *in hæreditate jacente* of him; and therefore the only regular way to affect such subjects is by confirming the same, as executors creditors. But if the nearest of kin have confirmed the same, decree must be recovered against them; and thereupon, or upon the dependence, the debts confirmed, due to the deceased, and, by the confirmation to the executors, may be arrested.

50. How debts due to, or by persons deceased, affectable.

BUT if the debtor of my debtor die, I may legally arrest in the hands of his representatives, or pursue forthcoming, in the same manner as my debtor himself might have recovered a decree on the passive titles for payment; because, by the arrestment, I am intitled, in the debtor's right, to a forthcoming of the subject arrested ^b.

^b July 31.
1707. MacDoual.

PAYMENT, in consequence of a decree of forthcoming, effectually extinguishes the debt, which was the ground of the arrestment; and likewise the debt arrested, to the extent of the debt arrested for and paid: but, till payment, the arrestment, and decree thereon, is but a collateral security, which the obtainer may use or not, as he pleases. If the subject arrested is illiquid, as the species of moveables, it may either be liquidated in the process of forthcoming; or, if the cause depended before the court of session, warrant may be granted to the judge ordinary to roup the goods, and deliver the price to the arrester, to the extent of his debt ^c. Where the person liable to double distress either makes voluntary payment, or, even upon a decree, to one of the parties who have affected the debt, otherwise than upon a decree of preference in a multiple-pounding, wherein all parties having interest are called to dispute the same, he will be liable to a second payment, if the person to whom he paid had not the preferable right; for he cannot, by his deed, prejudice the interest of third parties. And he who has recovered the first payment will be obliged to refund to him who had the preferable interest; for payment, tho' upon a decree, will not save the payer, who ought to have called the others concerned; since it could not be understood in law as a payment *bona fide* made, he being interpellated by the diligence of the other creditors. Nor will the receiver be allowed to retain, on pretence that *sum recepit*, viz. that he had got payment of a just debt; which never holds where others had preferably affected the subject out of which such payment is made.

^c Nov. 12.
1680. Stevenson.

51. Arrestment, in the hands of the representative of the debtor to my debtor, good.

52. The effect of payment, in consequence of a decree of forthcoming: a multiple-pounding is often necessary, in order to pay safely.

As no action of forthcoming can be sued, after the arrestment is prescribed by the lapse of five years, as above, so it likewise prescribes after

53. Prescription of arrestments, and

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actions there-
on ; breach
of arrest-
ment.

after it is commenced, unless wakened or insisted in every five years ^a. If the person, in whose hands the arrestment is made, deliver the goods, or pay the debt thereafter to the common debtor, he is not only liable to the arrester, as if the subject were still in his hands, but likewise to the breach of arrestment, of which I have discoursed formerly ^b.

^a P. 1669.
c. 9. P. 1685.
c. 14.

^b B. I. tit. 10.
§ 190, &c.

54. Subjects
arrested may
be poinded
bona fide by
another cre-
ditor.

AN arrestment is a legal prohibition upon the person against whom it is used, and likewise a preparatory diligence, in order to adjudging the subject to the arrester ; but that cannot hinder other creditors to poind the effects arrested ^c. However, if that happen by the fraud of the person in whose hands they are arrested, he will be still liable to the arrester *ex dolo* ; for he ought not to do any thing to the arrester's prejudice, but suffer legal diligence to have its due course ^d ; the rule of law and equity being, that *Alteri per alterum non debet iniqua conditio inferri* ^e, i. e. No hardship can be put upon one by the deed of another.

^c July 29.
1624. Hun-
ter.

^d Jan. 22.
1672. Bell.
^e L. 74. ff.
de reg. juris.

55. Competi-
tion between
arresters of
rents, and
donatories of
liferent-
escheat, or
adjudgers of
the lands.

AN arrester of rents is preferable to a posterior donatary of the debtor's liferent-escheat, tho' the denunciation was prior, it being only the gift and declarator thereon that denudes the common debt-
or ^f. But the arrester is not preferable to a prior adjudger, tho' not infest before the arrestment of the mails and duties ; because the ad-
judication is a virtual assignation to the rents, and, being judicial, needs not intimation ^g. However, arrestment of the current term is preferable to a posterior adjudger or disponee, who obtains right be-
fore the term, unless they are likewise infest ^h ; for then, the debtor being denuded before the term, the arrestment falls.

^f July 19.
1630. Nef-
bit. Feb. 24.
1637. Pil-
muir.
^g Nov. 22.
1633. War-
nock. Feb. 3.
1671. lord
Justice-clerk.
^h July 2.
1667. Littler.

56. And be-
tween an ar-
rester and ad-
judger of he-
ritable bonds,
before infest-
ment.

HERITABLE Bonds, before infestment, may be arrested, as has been said. But they may also be adjudged, which is another kind of judicial assignation of personal rights ; and, in competition between an arrestment and adjudication of such bond, the preference must be determined by the priority of the execution of arrestment, and sum-
mons of adjudication ; with this exception, that the first complete di-
ligence, by decree of forthcoming, or adjudication, if the other was *in mora*, is preferable ⁱ. There is nothing considerable in these adju-
dications, only the first adjudication of such bonds, and other rights whereon the debtor was not infest, is complete and effectual without a charge against the superior ; for it denudes the debtor, so that o-
thers, within year and day of its date, come in *pari passu*.

ⁱ June 26.
1705. Stew-
art, &c.
Hume (com-
petition)
p. 179. Jan.
8. 1724.
Syme.

57. How far
a defender in
a forthcom-
ing can ob-
ject to the
arrestment,
or ground
of it.

THE defender, in whose hands arrestment is laid, may object to the legality of the same, but not that the debt arrested for is paid, that being none of his concern, or *jus tertii* to him ^k ; unless he has interest, as having paid the debt to the common debtor after the ar-
restment, or to some of the competitors less preferable ; for then he virtually comes into their place, and may object whatever they might.

^k Decem. 21.
1621. Ha-
milton.

Observations on the Law of England, in relation to the Premises.

1. An assign-
ment ; assign-
ees in deed,

AN assignment is " the setting over, or appointing a right to an-
" other," and the proper terms in the English stile are, *Have given,*
granted,

granted, assigned, and set over. It is either an assignment in *Deed*, or an assignment in *Law*. An assignee in *Deed* is "a person appointed by deed;" as when a lessee of a term assigns over the same to another. An assignee in *Law* is "he whom the law makes," as an executor to a testator, and an administrator to the intestate. It is to be observed, that when a covenant relates to a thing in being, parcel of the demise, as to repair the house, the covenant shall go with the land, and bind the assignee, tho' he is not named or bound by express words; but if it concern a thing which was not in being at the time of the demise, as to build a new house, &c. it shall bind the party and his executors and administrators, but not his assignees, unless they are express; but tho' the covenant is express for one and his assigns, if the thing to be done doth not concern the thing demised, the assignee shall not be charged ^a.

and assignees in law; how far covenants in the deed bind the heirs or assigns to it.

^a Coke 5. rep. 16, &c.

By our law, assignees are subject to all the covenants or conditions contained in personal contracts, imposed upon the cedent, in relation to the subject thereof; and even the assignees of leases, containing power to assign, are liable to perform such terms.

As to things capable to be assigned, by the law of England, a lease, an annuity, rent-charge, tenancy by eligit, upon a judgment, tenancy by statute merchant, &c. may be assigned.

2. Things capable to be assigned, in a proper sense.

If tenant for life grant over his estate to another, and the grantee die before the grantor, there is place for an occupant; that is, the first that obtains possession of the subject has a title to it. This holds where such estate for life is created, either by the deeds of parties, as in the case of leases for life, or by act of the law, as estates by the courtesy or the dower ^b. In such case, with us, the representatives of the assigns or grantees would be intitled to the fruits and rents during the life of the tenant for life.

3. The case of an estate for life assigned.

^b Littl. sect. 56. et ibid. Coke.

In equity, a bond is assignable for a valuable consideration, and the assignee alone becomes intitled to the money; and if the obligor pays it to the obligee, after notice given him of the assignment, he will be compelled to pay it over again to the assignee ^c; but a personal trust cannot be assigned over ^d.

4. How far a bond assignable.

^c Vin. (assignment) 150. idem (obligation) 68.

^d Bac. new abr. (assignment) 157.

AN assignee, however, must take the bond, subject to the same objections that it was liable to in the hands of the obligee. Thus if, in a marriage treaty, the intended husband enters into a marriage broccage-bond, which is afterwards assigned to creditors, by the party's becoming bankrupt, and a commission of bankrupt taken out against him, it is liable to the same equity, and is not to be carried into execution against the obligor, more than it could at the suit of the obligee himself; and this occurred in the case of an assignment, in the most proper sense, the commissioners of a bankrupt having power, by the several statutes in that behalf, to assign the debts due to him ^e.

5. An assignee must take the bond subject to all the objections it was liable to in the hands of the obligee.

^e Bac. ibid.

If a lessee assigns over his term to another, the lessor may charge either him, or the assignee, as he pleases; but if he receives payment

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6. What if the lessee assign over his

lease, or if the assignee assign over to another.

of rent from the assignee, he has determined his election, and cannot thereafter sue the lessee. If the assignee assign over, he discharges himself of the rent not then become due, and the lessor must sue the second assignee ^a.

^a Coke 3. rep. 24.

7. What if a condition, that if the lessee assign his term, the lessor may re-enter, is broken.

WHERE the lease contains a condition, "that if the lessee assign his term, the lessor may re-enter;" if the lessee assign, and the lessor receives the rent of the assignee (not knowing of the assignment) he shall not be excluded of his entry, for the lessee shall not take benefit of his own fraud ^b. If a lessee assign his lease, and dies, his executors shall not be charged for rent due after his death ^c.

^b Coke 3. rep. 64.
^c Noy's, max. 71.

8. How far an authority, a right of entry, a thing in action, or title for condition broken, can be assigned; promissory notes, &c. may be assigned.

AN authority or trust cannot be assigned, unless it is granted to the trustee and his assigns. A right of entry, or thing in action in a strict propriety, or cause of suit, or title for condition broken, cannot be assigned, that pretended titles may not be granted to great men to oppress the meaner sort ^d. It is vulgarly said, that a thing in action, or a bond, may be assigned, in manner as is above related; but then one must sue for the same in the name of the assignor, as in the case of a letter of attorney: but, considering the signal effects such assignment hath, after notice given to the debtor, it amounts to a great deal more than a letter of attorney. By statute, promissory notes may be assigned over, in the same manner as inland bills of exchange ^e; and commissioners of bankrupt may assign over debts due to the bankrupt.

^d Coke 1. inst. 214. Finch. 16, 17.

^e 3 and 4 Annæ, c. 9.
^f Geo. I.

9. For what causes may a bond be assigned over; the assignment of a decree, how far good.

A CHOSE in action, or a bond, may be assigned over to the above effect, for lawful cause; as for payment of a just debt, or for money paid; but not for Maintenance, *i. e.* to another, in order to recover the money for the assignor's use, by assigning the bond to a more powerful adversary. And an assignment of a decree is void by the common law of England, tho' it may be good in equity ^f.

^f Vin. (assignment) p. 151.

In the general case, there is but little diversity between the law of England and Scotland, as to assignments; for we call assignments Procuratories *in rem suam*, tho', as to certain effects, they divest the cedents or assigners, after intimation is duly made of the same to the debtors; as upon the matter they likewise do by the law of England, after notice given to the obligor of the assignment made. By our law, all bonds, or other contracts, may be assigned, unless assignees are excluded, with an exception as to tacks, which regularly are not assignable, unless assigns are therein expressly comprehended.

10. Arrestments, in the sense of the law of Scotland, generally do not take place in England; but foreign attachment obtains in London, and some other trading towns.

ARRESTMENT in this title, and indeed commonly in our law-language, is an attachment, or authoritative stop put to the havers of a debtor's goods, or to his debtors, to deliver up the goods in their possession, or to pay the debts they owe him, till the debt he owes to the arrester is paid, or caution found for the same, to the extent of the sum arrested. But such mean of execution is not known in the law of England, except in the case of Foreign attachment, by the custom of London, and some other trading towns, as I observed in another place ^g, which seems to be an inconveniency to creditors: for, tho' a writ of *feri facias*, and likewise a writ of *eligit* and extent, affect

^g B. 1. tit. 10. observ.

TIT. II. Dispositions of other Subjects than Lands. 207

affect moveable goods and lands of the debtor, yet they do not reach things in action, or bonds due to the debtor; and how they can be reached, otherwise than by a statute of bankruptcy, I cannot apprehend.

To inquire a little into the foresaid custom of London, &c. One upon entering a plaint against his debtor, may attach a debt due to him from a third person (who is called the Garnisher) and this is denominated the Custom of Foreign Attachment; and is to no other purpose, but to compel an appearance of the defendant in the action; for, if he appear within a year and day, and put in bail to the action, the garnisher is discharged. But otherwise he may plead the attachment to any action brought against him by his creditor, who may traverse the cause of the attachment, by alleging, that he was not indebted to him who attached it; and even a debtor may, by the custom, attach the debt in his own hands, for so much due to him from his creditor^a.

^a Bac. new abr. (custom of London, of foreign attachment) 689.

^b Bac. ibid. Vin. (foreign attachment) 343.

^c Bac. ibid. 679.

A CREDITOR, before the day of payment of a debt due to him by obligation, cannot, by the custom, attach for it a debt due to his debtor, for the first debt is not then due; but a debt may be attached before the day of payment of it is come^b.

A DEBT, due by speciality, may be attached, but a debt recovered in any of the courts in Westminster, by judgment, cannot be attached by the custom, because the party has no time to plead it^c.

If in debt, upon an obligation of 100 l. conditioned for payment of 50 l. at a day certain, the defendant pleads, that, before the day of payment, it was attached in his hands by a creditor of the plaintiff's; and that, after the day of payment, upon a *scire facias* against him, he paid the 50 l. to the attacher, according to the custom, this is a good bar of the whole; because the attachment being made before the day of payment, it became a debt to the attacher, and the obligee could take no advantage of the breach of the condition thereafter^d.

^d Bac. ibid. 692.

11. The nature of foreign attachment.

12. Not competent before the term of payment of the debt for which it is used.

13. What debts are subject to foreign attachment.

14. Payment made to the attacher of the sum in the condition of the bond, a good bar against the obligee, as to the whole.

T I T. II.

Dispositions, Apprisings and Adjudications.

THE transmission of real rights is, likewise, either Voluntary, by dispositions; or Judicial, by apprisings and adjudications.

SECTION I. *Dispositions of other Subjects than Lands.*

DISPOSITIONS vary according to the subjects disposed. Dispositions to liferent infestments, tacks and servitudes, become effectual by real possession, which completes the rights. If the liferenter is not in the natural possession, the assignment of the liferent is perfected, by intimation to the possessors, or process against them at the assignee's instance. A general disposition, including heritable bonds, as those secluding executors, is sufficient to carry them, as a general

1. Dispositions of liferents of lands, tacks, servitudes and moveables, how made effectual.

general service would^a, so that there needs no adjudication against the heir in implement. Dispositions of moveables are completed, by delivery of the subjects disposed. And because moveables, for most part, pass in commerce without writing, or even witnesses, therefore possession presumes property; and one that claims them from a lawful possessor must not only prove that they were once his, but likewise how he lost the possession, as that they were lent, hired or strayed^b, as I have more fully observed elsewhere^c.

^a Hume (service, &c.)
July 1728.
Grant.

2. The effect of a general disposition of moveables.

A GENERAL disposition of moveables is no farther effectual against third parties, than so far as delivery and possession is attained thereon, as to the species of moveables; for whether the deed was revocable or not, yet the inviolable maxim of law is, that *Traditionibus et usucapionibus, dominia rerum, non nudis pactis, transferuntur*^d.

^b Feb. 3.
1672. Scot.
Feb. 24.
1672.
Semple. Nov.
18. 1680.
Forlyth. Feb.
15. 1712.
Boid.
^c B. 1. tit. 8.
b. 2. tit. 1.
^d L. 20. c. de
pact.

3. How far a general right or disposition to bonds, with delivery of the bonds intimated, divests the cedent.

IN a general right "to all bonds due to the granter," I doubt much, if the delivery of the bonds, and intimation made of the right to the debtors therein, would divest the granter, so as to exclude his creditors thereafter arresting in the hands of the debtors; for still it is but a general right that is intimated. And, since the late statute^e requires special assignations, in order to bar the necessity of confirmation, it follows of course, that, by a general assignation of bonds, the creditor who grants it still remains vested with a right to the same; which, on his death, must be taken out of his person by confirmation; and consequently, in his life, may be affected by arrestments.

^e P. 1690.
c. 26.

SECTION II. *Disposition, or Conveyance of Lands.*

4. In what case does a bargain about lands bind, tho' not in writing.

RIGHTS of lands cannot pass without a legal deed in writing, as the right to the lands is constituted by writing in the author's person; and, until such deed is executed and delivered, there is place for rescinding; unless part of the price is paid, for that binds the bargain, as being *rei interventus*^f. As to the udal lands in Orkney and Zetland, I have discoursed of them in another place^g.

^f Fount.
Decem. 23
1697. Laurie.
Decem. 5.
1699. Thomson.
^g B. 2. tit. 3.
§ 3.

5. Disposition of lands, either in order to a base infestment de me;

THE most ordinary subject of dispositions is of lands, or other heritable rights by infestment. When those are intended to be held of the granter, an original right is created by infestment thereon. But the superiority remaining with the granter, this is not a transmission of the whole right, but of the property only. This is called a Base-holding, from the French word *Bas*, i. e. low; or an infestment, *de me*, i. e. holding of the disponent.

6. Or to a public infestment a me. The effect of a perpetual assignation to the rents of land.

DISPOSITIONS, that absolutely denude the granter, are with procuratory of resignation, or a precept of seisin, to be holden of the granter's superior, and are completed by infestment, either upon resignation or confirmation. Those are called Public infestments, in contradistinction to base infestments, which were esteemed private and latent, before institution of the records^h; as likewise *a me*, as holding from the disponent of the superior. The disposition itself implies an assignation to the mails and duties, or rents and profits of the lands, requiring intimation to perfect it, as any other assignation to the

^h P. 1540.
c. 105.

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the rents; but which, as other assignations to rents, unless the disponee obtains himself infeft, will only be effectual while the right of fee remains with the granter; for a disposition of lands can only be perfected by seisin, or infeftment in the disponee's person. However, a perpetual assignment to the rents will be effectual against the granter and his heirs, to compel them by action to transmit the property^a.

^a July 2. 1667. Sinclair.

MUTUAL indentures in England, relating to an estate in Scotland, will produce action before our courts here, in order to make the same effectual^b; tho' a devise in England of lands in Scotland would not, more than a testament here, carry them.

^b July 5. 1708. Earl Winton.

7. Indentures in England, but not a devise of lands lying in Scotland, good.

RESIGNATION is either by a procurator, and then its warrant is the Procuratory of resignation contained in the disposition, or apart; or by the resigner himself, *Propriis manibus*; and then the disposition, or other obligation to grant the right, supports the instrument of resignation, which otherwise is but the assertion of the notary. Resignation is either in favour of the superior himself, termed *Ad perpetuam remanentiam*, and then it is an extinction of the fee, which is thereby consolidated with the superiority, of which I have discoursed elsewhere^c. Or in favour of the resigner himself; this is frequently done, when the fiar intends an alteration of heirs, or to burthen the fee with qualities and conditions, or clauses irritant, which is most effectually done by a new charter, and seisin thereon. Or, lastly, in favour of the acquirer, which is the only kind of resignation proper here, being in order to transmit the right by a regular conveyance. Resignation *in favorem*, or in favour of a purchaser, must be made in the superior's hands, or his commissioners, having power to receive resignations, by delivery of staff or bastion, or a pen, as the symbol of resignation, to the superior, and his re-delivery of the same to the purchaser. All this with its warrant, and in whose favour the surrender is made, must be expressed in an extended instrument, taken upon the resignation in the hand of a notary, and duly subscribed by him before two signing witnesses.

^c B. 2. tit. 4. § 3, 4. tit. 11. § 2, 3.

8. Resignation, either by a procurator, or propriis manibus of the disposer, in favour of the resigner, the superior, or of a third party; must be by the proper symbol, in form of instrument.

THE effect of a resignation, *in favorem*, is not by itself to denude the granter, who still remains in the fee^d, being only a preparatory step, and conditional, for new infeftment to the acquirer: therefore, till the purchaser is infeft, by charter from the superior, and seisin thereon, in consequence of the resignation, the resigner is fiar. Hence a second right granted by the resigner, whereupon infeftment is first taken, either base, holding of the granter, or public, by resignation or confirmation, will be preferable to the first disponee's, notwithstanding the resignation. In such case the superior, who accepts of a second resignation, as likewise the disposer who grants double rights, are liable to the first disponee in damages, and punishable with infamy, and guilty of the crime of *stellionate*^e. To all those the second disponee is likewise subject, and the right liable to reduction, if he was partaker of the fraud. Instruments of resignation, or procuratories of resignation, which of old were executed on writings apart, are not necessary to be produced as parts of a progress, after 40 years possession^f.

^d Nov. 4. 1677. Purves.

9. The effect of resignation, in favour, before infeftment.

^e P. 1590. c. 105.

^f P. 1594. c. 218.

10. The superior, by the late act, bound to receive every disponee, upon the procuratory in his disposition, on tender of the composition, even tho' the same contain a strict entail.

Tho' the original right from the superior bore Assignees, yet, after infeftment taken on the right, he was not bound to accept of resignations in favour of singular successors; assignees, in the first charter, being understood only to imply assignees thereto before infeftment, in which case only the superior was bound to admit the assignee^a; but, if he accepted of resignation, he behoved to grant a new charter to the acquirer, in terms thereof. And, if adjudication was led against the disponer, on the obligation to infeft, the superior might be charged to receive the disponee, as in the case of other adjudications. And now, by the late act^b, all superiors are bound to receive disponees upon tender of the composition, without the circuit of an adjudication, provided the disposition contain procuratory of resignation. And tho' of old no strict entail could be made without consent of the superior^c, yet, whatever doubt might have been made before this statute touching that point, there can be none at present, since the statute makes no distinction between fee-simple and tailed; tho', in this last, the superior's case is made worse by the loss of compositions for entries from singular successors.

^a Decem. 23. 1673. Ogilvie.

^b 20 Geo. II.

^c Craig, lib. 2. dieg. 16. § pen.

11. A charter taken by the disponee, in favour of another in fee, and infeftment thereon, denudes him without an assignment to the procuratory.

A DISPOSITION, or at least a procuratory of resignation in favour of another, is regularly requisite in a voluntary conveyance of the fee. But, if one that has a disposition to himself, his heirs and assignees, take a charter from the superior to himself in liferent only, and to another in fee, it will denude him of the fee, by his accepting and using the right in those terms; more especially, if he is attorney in taking the seisin, and that without a deed in writing, denuding himself of the fee: his taking the charter in favour of the other supplies an assignment of the procuratory in the disposition, in terms of the charter^d.

^d Edg. Dec. 30. 1724. Cubison,

12. Infeftment by confirmation; it may take place after the death of disponer or disponee.

THE other way, whereby the right of fee is transmitted from the disponer to the disponee, is by confirmation. When one disposes, with a precept of seisin, to hold the lands from him of the superior, and the superior confirms the seisin taken thereon, or precept, in order to the giving thereof, and seisin is taken accordingly, it becomes a public infeftment by confirmation, of which I have already treated a little^e, and shall add what farther occurs. Confirmation may be by any vested in the superiority at the time; nor will the death of the disponee or disponer hinder its effect. Thus, a charter of confirmation of the disponee's infeftment, after his death, renders it a public infeftment, and may therefore contain a precept of *clare constat* in favour of the heir. By such confirmation the disponee's infeftment convalesces from its date, as if it had been then confirmed, unless a mid impediment intervene. Thus likewise, if the disponer die before confirmation, and his heir is infeft, that will not hinder the heir of the disponee to obtain a confirmation of his predecessor's infeftment, and himself to be infeft as heir on the superior's precept of *clare constat*; because, by the confirmation, his predecessor's infeftment became public, and consequently the regular way for the heir to be infeft is by the superior's precept. The heir of the disponer is in no better case than the disponer himself, whose infeftment only subsists till the disponee's is confirmed by the superior, and then ceases.

^e B. 2. tit. 3. § 35.

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THE most ordinary mid impediment, which hinders the effect of confirmation of a right to be holden of the superior, is posterior intervening rights or diligences, denuding the vassal in whole or in part, before the confirmation. Where infeftments have followed upon those intervening rights, the case is clear, that the right, thereafter confirmed, can have no effect against them; because they are the first complete rights. But if adjudication, at another party's instance, has only followed against the disponer, after the disponent is infeft on his precept, but before the confirmation, the question is, if it will hinder the confirmation to be drawn back to the date of the seisin? I conceive that, at least, unless a charge be given to the superior, at the instance of the adjudger, to infeft him, the superior may safely grant a confirmation to the disponent, which will have its full effect; for the simple adjudication does not denude the vassal; and the superior, till such charge is given, is *in bona fide* to grant confirmation to the disponent, who thereby has the first complete right. Infeftment taken on the precept in a disposition, to be holden solely of the granter's superior, does not render it a real right till confirmation, there being none of whom it is holden, and, without a superior, there can be no feudal right. Hence, a disposition, tho' vested with a seisin, to be holden only of the superior, or *A me*, as it is generally called, remaining still personal before confirmation, is carried by a general service ^a.

13. What mid impediment hinders the effect of a confirmation of an infeftment a me; how far such infeftment good before confirmation.

^a July 10.
1713. Douglas.

IT certainly is the most prudent and safe method, more especially now, when ward-tenure is abrogated, to take the precept from the disponer, relating to infeftment, to be holden of him, and from him of his superior; for, till confirmation, the right is a complete base holding, and thereafter it becomes public. By this means the intervening deeds of the disponer, or diligences against him, can have no great effect: they can only prevent the disponent's right from being a public holding of the disponer's superior; but still it will remain good as to the property, to be holden of the disponer, or those that come into his right before the confirmation. Confirmation of such rights, where no mid impediments intervene, or of rights solely to be holden of the disponent's superior, absolutely divests the disponer of the whole right. There was danger of recognition formerly, by taking seisin of ward lands upon the disponer's precept; but now, that tenure being abolished ^b, there can be no place for such hazard by base infeftments.

14. Most prudent to take the precept for infefting either a me or de me.

^b 20 Geo. II.

CONFIRMATION of rights, solely to be holden base of the disponer, does not render them public infeftments; because they hold still of the disponer. But it had this effect, that, when granted by the king, it saved the subvassals from recognition or forfeiture, arising from deeds of the disponer, tho' not from any other casualty falling thro' him. And, when granted by a subject superior, it secures the sub-vassal from all casualties falling thro' the disponer or his heirs; because the superior, who consents to the right, is thereby understood to renounce them ^c. But confirmations by the crown pass of course, and therefore only exclude the king from evicting the property from the sub-vassal, on account of any deeds of the immediate vassal: but still the other

15. What the effect of a confirmation of an infeftment de me.

^c July 1.
1672. Earl Eglington.

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other casualties fall thro' him; for he is the crown's vassal, and there can be no intention presumed to renounce them.

16. The import of the maxim, *Jus superveniens auctori accrescit successori*; how far it operates, when the author is not infeft at the time, but thereafter is.

WHEN one disposes a subject, with absolute warrandice, express or implied, or "for all right he hath, or shall acquire thereto," any right that afterwards superveneens to him or his heirs accrues to the purchaser, who is termed Singular Successor, as the disposer is called the Author: this is founded in common justice. Hence, the rule in our law is, that *Jus superveniens auctori accrescit successori*^a. The accretion is, *ipso jure*, without any new deed; and therefore, tho' the author should make over the superveneing right for onerous causes, yet this could not prejudice the first acquirer of the principal right perfected in his person. Where one, who has only the right of apparen- cy, or any other right to lands, not completed by infeftment, grants several onerous rights, whereon infeftments follow, and is himself afterwards infeft, the respective rights, granted by him with absolute warrandice, become valid, and are preferable, according to the priority of their infeftments, and registration of the same, even tho' one of the persons last infeft had procured the author to be infeft on his expence^b: this proceeds on the foresaid principle of *Jus superveniens*, &c. And, by the same rule, infeftments, granted by the author before he is infeft, will be preferable to those granted by him after he is vested in the fee.

^a July 13. 1664. Earl of Lauderdale. June 21. 1671. Neilson. July 24. 1706. Carruthers.

^b July 1742. Paterfon contra Kelly.

17. The effect of the rule, when one, that has no right, disposes with consent of him that has.

IF one, who has no right, disposes with consent of another that has the right, it will be sufficient to transmit all right in the consenter's person at the time; because, in that respect, he is virtually a disposer. But if he does not grant absolute warrandice, or consent "for all right he has, or shall have," the former rule of *Jus superveniens auctori*, &c. will not take place against the consenter, who may make use of any new right he acquires to the subject, or that accrues to him, against the disponent, to whom he is not properly author^c.

^c Dirlet. dec. 128. July 7. 1681. Stewart.

18. The rule takes place in all onerous deeds, but not in legal diligences.

THIS maxim, *Jus superveniens auctori*, &c. founded upon a fiction of law, which supposes the author to have been infeft at the date of granting the right, takes place in all onerous deeds importing absolute warrandice. Or even in gratuitous deeds, where granted with such express warrandice, if the granter was not insolvent at the time, so as the right should fall under the act 1621; and therefore annual- rents, tacks, servitudes, &c. are thereby secured^d.

^d Jan. 16. 1663. Kilchattan. June 21. 1671. Neilson.

BUT, as to legal diligences, the maxim will not aid them: for example, a creditor adjudges against an heir who is unentred, without charging him to enter heir in special to his ancestor last infeft; the heir comes thereafter to enter and infeft himself in the lands, his right will not accrue to the adjudger; for the diligence must be considered as the case stood when it was led, and cannot be supplied by what happens afterwards^e. The heir here is liable in no warrandice to the creditor, and it is the absolute warrandice whereby the party is compellable to make over the superveneing right, to support the deed formerly granted, that founds the maxim.

^e Fount. Jan. 10. 1699. Duncan. July 1746. Hunter.

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DISPOSITIONS frequently contain reserved powers or faculties to the granter to contract debt, or to alter or revoke the right : and tho' these are for most part reserved to the disponer, yet sometimes such are created in favour of third parties. A reserved faculty, to recall or burthen the right, does by no means import a fee in the disponer ; for he is divested of the fee by the disposition, and infeftment thereon ; but only a power whereby he may reinvest himself with it, or burthen the subject, to the extent of the faculty : hence, in case the faculty is not exercised by the disponer in his own life, it expires with him, and the fee remains absolute with the disponee. But if the disponer has contracted debts, tho' not directly in exercise of the faculty ; but, by bonds, obliging himself, his heirs and successors, the creditors may thereon adjudge the lands, either in the disponer's life, or after his death, from his heir, whereby the disponee's right will be carried or affected after discussing the heirs and other representatives of the debtor^a ; because the disponee, under such faculty, is, in effect, heir of provision to the disponer, and liable to his debt to the extent of the subject, or so far as the faculty extends, after discussing the universal representatives of the debtor. A faculty, created in favour of a third person, sometimes resolves into *nudum officium*, or simple arbitrement over the fee, whereby no benefit shall result to himself by the exercise of it ; as when a power is given to one to evacuate and recall the fee disposed to another^b ; or where the fiar disposes his estate "To such persons, as the trustee named in the deed shall appoint." A conveyance of such kind is somewhat extraordinary ; and as an imaginary case was put by lord Dirlton of old, and a doubt moved thereon^c, so a real case of that nature occurred, and the court of session sustained the disposition to take effect in favour of the person named by the trustee in the deed^d. Such faculty might seem to be a mandate or commission, and to fall by the granter's death ; but it is a quality accompanying the right, and the disponer is conditionally denuded of the estate, *viz.* "In case the trustee name a disponee thereto ;" and, in default of such nomination, the condition fails, and the right devolves to the disponer's heir at law, or conform to the former destinations of the estate.

A FACULTY of this kind may be exercised at any time of the trustee's life, or on death-bed ; because he does not, by such deed, prejudice his own heirs ; and the heir of the disponer has no interest, being excluded by the disposition, and the trustee's acceptance of the right so qualified. It is self-evident, that a faculty of this kind cannot be adjudged for the trustee's debt, being no proper right of his. But if there is a faculty created in favour of a third person, for his own behoof, whereby he may burthen the estate with sums of money, or alien it in prejudice of the disponee, for his own benefit, I conceive this power will be subject to his debts, tho' not contracted in direct exercise of the faculty, in the same manner as was just said of faculties reserved to the disponer himself.

If one dispone his estate to his presumptive heir, or person intitled to inherit, with a reserved faculty to himself to alter and revoke, it cannot be exercised on death-bed to the prejudice of the heir, more than the estate could be then aliened or burthened ; for the heir

19. The effect of faculties, reserved either to the disponer, or created to third parties, to contract debt on the subject disposed, or to alter and revoke the disposition, or to name a disponee to the estate.

20. Can a reserved faculty be exercised on death-bed.

^a June 21. 1677. Hope. Pringle. Jan. 17. 1723. creditors of Riscow.

^b Jan. 2. 1706. Dundas.

^c Dirl. (dispositio collata in arbitrium alterius).

^d Nov. 28. 1729. Murray contra Fleming.

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may repudiate the disposition, and reduce the deed granted on death-bed *ex capite lecti*. But if the heir has accepted of the disposition so qualified, he cannot afterwards complain, tho' the faculty should be used on death-bed^a; for one cannot approbate and reprobate, *Et volenti non fit injuria*.

21. How far such faculties can be exercised in prejudice of purchasers from the disponee, or his creditors infest before.

THERE is no doubt but such faculty may be exerted at pleasure, in prejudice of an extraneous disponee and his heirs. But as to his onerous singular successors, they will not be subjected thereto, unless it is ingrossed in the procuratory of resignation, charter and seisin, or at least in the precept of seisin, and instrument thereon. And, even in that case, deeds in exertion thereof will not be regarded, in questions with onerous singular successors, or creditors of the disponee, except such deeds are made real before the purchaser's or creditor's infestment^b; and then the case will be determined according to the priority of the registration of the infestments of the respective competitors, either by rights from the disponent, or from the disponee. Personal debts, or deeds in exercise of the faculty, cannot be more effectual against the disponee's singular successors, than a general burthen of debts would, and which the court of session, not many years since, in a solemn decision, found not real in such case^c. I shall take notice afterwards how far such faculties are carried by forfeiture^d.

22. How such faculties may be effectually renounced.

IF one, who has interest in lands, consent to another's disposition of them, unless such consent appear on the records, it cannot militate against his singular successors, when his right is such as cannot be extinguished by a personal deed; because, in such case, the singular successor purchases on the faith of the records. But such faculties, whereof I have been discoursing, are personal in their own nature, being no right of fee, and therefore may be discharged or renounced by a personal deed. And even the consent of the person, endued with such faculty, to the disponee's providing the estate charged therewith, in favour of his wife in liferent, and his children *nascituri* in a contract of marriage in fee, was found to be a virtual renouncing of the faculty^e, in prejudice of his creditors, prior or posterior to the contract; because they were merely personal at the time, and the disponee's right of fee, constituted by infestment, became, by the renunciation, absolute, and preferable to any subsequent diligences used by the creditors for affecting the fee. I have discoursed elsewhere upon reserved faculties^f, to which I shall add no farther.

23. Whether an obligation by one, possessed of a disposition of lands to convey it, is equal to a conveyance.

IF one, who has a right to lands by disposition, containing procuratory of resignation, and precept of seisin, without infestment, grant a personal obligation to convey the same, and thereafter the disposition is adjudged by another, the adjudger is preferable^g; because the personal obligation did not transmit the right, and therefore it was still affectable by the creditors of the disponee, and carried by the adjudication. Wherefore it does not hold in respect to heritable rights of lands, that an obligation to grant a right is equal to the right, which however obtains, if it relate to moveables.

^a Feb. 8. 1706. Bertram. July 1748. Cunningham contra Whiteford.

^b Hume decision. 16.

^c July 27. 1734. creditors of MacLellan of Barclay competing. ^d Inf. tit. 3.

^e July 1734. children of Blair of Borgue.

^f B. 2. tit. 33. § 127, 128, 129.

^g Hume (obligations) Jan. 17. 1734. Sinclair.

DISPOSITIONS, or conveyances of lands, become real rights only by feisin thereon, which, as above, is effected, either in virtue of charters from the superior, of resignation or confirmation, whereby a public infeftment is constituted, or upon the disponer's precept of feisin, which creates a base infeftment. I have spoken fully of the solemnities and requisites of instruments of feisin, in discoursing upon the constitution of real rights^a; I shall only here take notice, that infeftment may be taken upon such procuratories of resignation, and precepts of feisin, after the granter's or receiver's death^b; which prevents a circuit of processes and diligences, that was of old necessary, in such event, to complete the feudal right by infeftment.

^aB. 2. tit. 3.
§ 4.

^bP. 1693.
c. 35.

24. Conveyances of lands only perfected by infeftment, which may proceed after the death of the granter or receiver of the right.

SECTION III. *Apprisings or Comprisings.*

HERITABLE rights, personal or real, are judicially transmitted by apprisings or comprisings, and adjudications. Before apprisings were introduced, the course of payment of debts was, that if the debtor, upon 15 days notice by the sheriff of the deficiency of moveable goods, did not sell lands for payment of his debt, the sheriff, or other judge ordinary, was to sell the same to the extent of the debt, and grant infeftment to the buyer, if the lands held of the crown. And if of any other superior, he was to have the first offer of the lands at the price put on them by the sheriff, (called the king's price) and, if he refused, they were to be sold to any other, and the superior was bound to receive him, by the same manner of holding as the debtor held them^c. This judicial sale was without any reversion to the debtor, or composition to the superior; but the first offer of the lands made to him by the sheriff, founded his Option to take the lands, and undergo the debt, continued to him when apprisings were established.

^cStat. Alexander II.
c. 24.

25. Judicial dispositions are either apprisings or adjudications. The method of real execution for payment of debts before the use of apprisings.

THIS method of execution, for payment of debts, hath been derived to us from the civil law: for, except as to what concerns the superior, which is peculiar to the feudal usages, the same form obtained among the Romans^d. The moveables of the debtor were to be taken first in execution, and forthwith sold, and then his lands behoved to be exposed to sale; and, if they found no purchaser, they were to be valued by the judge who pronounced the decree, and given to the creditor, to the extent of the debt for which he had judgment. And last of all, the *nomina*, or debts due to the debtor, in default of moveables and lands, were to be adjudged to the creditor. We have nothing of the manner or order in which debts due to the debtor were to be made effectual to his creditors in this old statute; but, to be sure, they were left to the last place; and, I conceive, that arrestments and decrees of forthcoming are of a much later invention. Apprisings varied a little from this old method of execution for debt upon the effects and estate of the debtor, but in the main kept to it.

^dL. 15. § 2.
3. ff. de re
judic.

26. This old method of execution upon the effects and estate of the debtor, derived to us from the civil law.

OF old, creditors could not proceed to execution upon the debtor's effects, if he was incarcerated for the same debt, and on that ground he could stop such execution, which, as it took place in the case of apprisings^e, I doubt not but it obtained likewise in the antient method before described. Our ancestors thought, that if the creditor

^eCraig, lib. 3.
dieg. 2. § 3.

27. Antiently creditors could not proceed to real execution, if the debtor was seized

seized

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incarcerated
for the same
debt.

seized the body of his debtor, he could not proceed farther, his person being principally bound. But this course was justly receded from by subsequent practice; for the creditor may well affect the estate of his debtor, who will not convey it for his security, by legal diligence.

28. Apprisings
curfori-
ly explained.

AN apprising was a decree by a messenger, as sheriff in that part, constituted by the king's commission in the letters of apprising, whereby the whole lands, or other heritable rights contained in the letters, were appraised and disposed from the debtor to the creditor, for payment of the debt, redeemable within the legal reversion, or the time allowed by law for redemption thereof, by payment of the debt. Apprisings were originally carried on before the sheriff, or other judge ordinary, on the ground of the lands^a, and part of the lands were appraised or appretiated to the value of the debt, by an inquest of 13 or 15 sworn persons, and they had from thence their name, and which was the course in Sir Thomas Craig's time^b. The lords of session afterwards, on common bills, granted warrant for letters of apprising, directed to messengers, as constituted sheriffs for that end, and therefore called *Sheriffs in that part*; and likewise dispensed with the place of apprising, generally appointing the session-house in Edinburgh for leading apprisings. This, I presume, was introduced, that the writers to the signet, who officiated as clerks to the apprisings, might conveniently attend, in order to the conducting them^c. The whole lands came at last, by a great abuse, to be appraised, without considering their value or extent of the debt. But still there must have been an inquest or jury, tho' their appretiation could only be for form's sake, no regard being had to the value of the lands. Those apprisings were originally redeemable by the debtor in seven years, which term is called the Legal.

^aP. 1469.
c. 36.

^bLib. 3.
dieg. 2. § 21.

^cP. 1672.
c. 16. § 33.

29. Apprisings,
within
year and day
of the first
effectual one,
brought in
pari passu.

THIS custom of appraising the debtor's whole estate, for payment of the first appraiser's debt, was pernicious to the other creditors, who had only the reversion to appraise and rely on for their payment; and, for the most part, wanted money to redeem the first appraising, and so were cut off by the expiration of the legal reversion of the first appraising. To remedy this inconveniency, the act 1661^d provides, "That all apprisings, within year and day of the first effectual one, shall come in *pari passu*, as if one appraising were led for the whole;" and this act prolongs the legal from seven to ten years.

^dC. 62.

30. The solemnities
of
apprisings.

THE letters of appraising behoved to be published at the market-cross of the head-borow of the shire where the lands lie, termed, A Denunciation: and likewise must have been executed upon the ground of the lands; the import of which execution was, that the lands, and other rights relating thereto, belonging to the debtor, were to be appraised on such a day, and at such a place; and it behoved also to be executed against the debtor, 15 days before leading the appraising, without counting the day of the denunciation, or that on which the appraising was led, otherwise the appraising was null, by act of federunt^e. The execution must have born delivery of a schedule of the letters of appraising to the debtor, or leaving it at his dwelling-house, that he might come prepared, and possibly prevent the appraising, by payment of the debt. And it must also have mentioned, that the

^eSpotis-
wood (ap-
prisings.) Act
of federunt.
June 27.
1623. obs.
by Durie.
Newt. decis.
3.

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^a Jan. 29.
1624. Hope-
Pringle.

the messenger searched for moveables at the debtor's house, and on the ground, and found none^a. And, if that solemnity was not mentioned in the apprising to have been used, it was void, the express condition in the letters being, that the lands shall be appraised only in default of moveables. But it was sufficient, that the messenger's execution bore, that he searched for moveables, and found none. And this, according to Craig, was not traversable, by proving that there were such goods, in order to reduce the apprising^b.

^b Craig, lib. 3.
dieg. 2. § 3.

DECREES of apprising were in use to be registred; but that custom was prohibited, and they were ordained to be Allowed by the court of session, and the Allowance to be recorded within 60 days after their date; otherwise the apprising first recorded was preferable, as to that step of diligence^c. This allowance contained a short note of the apprising, the creditor's and debtor's names, the debt appraised for, and the lands appraised, and a warrant to charge the superior, if a subject, to receive the appriser, by granting him a charter of the lands; and, if the lands were holden of the crown, he was infeft by a precept from the director of the chancery.

31. Allow-
ance of ap-
prisings.

^c P. 1661.
c. 31.

AFTER the custom of apprising the whole lands took place, the appriser might have possessed the whole, tho' the rents far exceeded the interest of the sums due to him, during the legal, and was not accountable. But this hardship was remedied by statute, which declared, that if the appriser intermeddled with more rents than paid his interest, the overplus should be imputed to his principal sum; and, if his whole debt was satisfied within the legal, the apprising should expire *ipso facto*^d. And after the statute 1661, bringing in all apprisings within year and day of the first effectual one, all apprisers were intitled alike to the possession, during the legal reversion, as they were to the lands after it was expired. Except as to the form, Adjudications, introduced in place of apprisings^e, are the very same, and have the like effect. And therefore, I shall not enlarge farther on apprisings, which are now abrogated, but proceed to adjudications.

32. Apprif-
ers, how far
intitled to
possess the
whole lands.

^d P. 1621.
c. 6.

^e P. 1672.
c. 19.

SECTION IV. *Adjudications, in place of Apprisings.*

AN Adjudication is "a decree of the court of session, whereby the
" lands, or other heritable subjects libelled in the summons, are ad-
" judged from the debtor to the pursuer, in satisfaction of his debt,
" redeemable within the time limited by law." This reversion, in-
troduced by law, is commonly termed the Legal, that is, the legal
reversion, and is 10 years after the decree of adjudication. The
summons needs only be executed against the debtor, as in any other
ordinary action. There must be libelled, "That such parts of the
" lands as correspond to the debt and a fifth part more, may be ad-
" judged, the defender producing a progress of right thereto, and
" freeing the same of incumbrances, and putting the pursuer in pos-
" session; and, in default thereof, that the whole lands libelled be
" adjudged in satisfaction of the sums, principal, interest and pe-
" nalties, accumulated into one sum."

33. General
adjudicati-
ons, and pro-
cedure in or-
der thereto.

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THIS being an executorial process, no defences will be sustained against even the first adjudication, unless they are instantly verified; for otherwise they are reserved, *Contra executionem*, viz. to be proposed in any action of mails and duties, upon the adjudication^a. The first summons of adjudication must come in by course of the roll. But subsequent ones are brought in summarily, that they may be within year and day of the first; and then no partial adjudication, by producing a progress, is competent, for the same reason. And for that purpose likewise the court, upon the adjudger's application, will grant warrant for inrolling his summons before the days of compare are run.

^a July 26.
1676. Boid.
Fount. Dec.
16. 1707.
Tod.

34. Special adjudications, their effect.

If a progress is produced, then the lands, or other subjects, amounting to the value of the debt, viz. principal sum and interest, and a fifth part more, are adjudged to the pursuer^b. The adjudger, in this case, is not accountable for his possession, nor do any, within year and day, come in *pari passu* with him, and the adjudication is redeemable only in five years. This is termed *A special adjudication*.

^b Newt. decif.
40.

35. The defender has his option what subjects to give a progress to.

IN these adjudications the debtor has his option, what lands or houses he shall give a progress to; and, if he chuse houses, the creditor must be put in possession to the value of his debt, and a fifth part more, tho' the rent of the houses, valued perhaps at 10 years purchase, far exceed the interest of the sums adjudged for. And the debtor, on redeeming, must pay the whole debt, and a fifth part more^c. This seems hard, since the creditor, in that case, is not to hold the land for his money, which gave occasion to that fifth. The creditor, put in possession upon such special adjudication, can use no diligence, personal or real, for payment of the debt, except in case of eviction of the lands, by the express terms of the statute.

^c July 1735.
Watson contra Bailly.

36. In default of producing a progress, a general adjudication proceeds; why special adjudications seldom laid hold on.

IF no sufficient progress is produced, or the incumbrances be not purged, then the whole lands libelled are adjudged, as was the later custom in apprisings, and the legal is 10 years, in terms of the statute to that purpose^d. Notwithstanding that it would seem the debtor's interest rather to submit to a special adjudication than a general one, yet it seldom has been practised. But still a term is allowed, in the first adjudication, to the defender, to produce a progress, but which is not competent in subsequent ones, as above. The debtors do not, for most part, comply with this measure; because, perhaps, they conceive, that the fifth part more, and the limitation of the legal is a hardship. And besides, they are not commonly able to purge incumbrances; whereby this remedy, against general adjudications, has become almost ineffectual, tho' it is sometimes practised, as appears from the forecited late instance. These special adjudications, however, are expedient to avoid a run of adjudications within year and day of the first, of dangerous consequence to the debtor, which is the case in general adjudications.

^d P. 1661.
c. 62.

37. The ground of adjudications, that came in place of apprisings,

THE ground of those adjudications that came in place of apprisings, must be a liquid debt, heritable or moveable. If it is an heritable bond, payable on requisition, that must be previously used, otherwise the adjudication is null; but, if it is payable on a charge of horning,

TIT. II. Adjudications, in place of Apprisings. 219

^a July 21.
1666. Thom-
son. Feb. 11.
168c. Gor-
don.
^b July 3.
1707. Dun-
can.

horning without requisition, the adjudication may proceed, tho' no charge is given, being then understood a liquid sum^a. If the debtor is dead, there must be a constitution against the heir, by decree on the passive titles, requisition being previously used, if that was necessary by the conception of the bond^b.

must be a li-
quid sum.

ANY heritable subject, right of liferent, or the husband's *jus mariti* in the wife's lands, reversions, tacks, tithes, annualrents, or even faculties, in relation to lands belonging to the debtor, and likewise heirship-moveable, may be adjudged.

38. What
subjects may
be adjudged.

IT may be doubted, whether an adjudication will carry the arrearages of an infestment of annualrent; because the annualrent itself being adjudged, the bygoness may seem to follow it, as the fruits do the tree before they are severed, and as being a Lien or burthen upon the land, in which respect they differ from bygone rents. But I conceive, notwithstanding, that they are not adjudgeable more than bygone rents, they, in reality, being parcel of the rents: for an annualrent is *annuus redditus*, or an yearly rent out of lands; only, for the creditors security, the lands are pledged for the same as much as for the stock. Nor can they be compared to fruits growing upon the tree, but rather to those fallen off but not gathered in, since annualrents after the term become due, and may be exacted. The parallel may hold between the current term and growing fruit, which, either in lands, or annualrents out of them, will, with the lands, be carried by the adjudication of the lands.

39. Bygoness,
upon an in-
festment of
annualrents,
are not ad-
judgeable,
more than
bygone rents
of lands.

IT has been made a question, whether an heritable office, or an office for life, or a term for years, was adjudgeable? The resolution touching all these kinds of offices depends upon the following rules. And, in the first place, no judicial office, tho' for life or years, can be the subject of such diligence, those being personal and unalienable. Next, as to other kinds of offices, whence profits may accrue by the exercise of them, or to which salaries are annexed, as that of the king's printer, for a term of years, of which at the time divers were still to run; and that of the king's usher, which is hereditary; these being patrimonial interests, and capable to be exercised by others than the grantees, the court of session found the same adjudgeable^c. And, by the same rule, heritable sheriffships and regalities, while such subsisted, were adjudgeable, as they were the subject of apprisings formerly. This we are informed of by the learned Craig^d, and the nature of the thing shews it; for such offices, being annexed to the lands, must follow the same.

40. How far
offices ad-
judgeable.

^c July 23.
1747. Cock-
burn.

^d De feud.
lib. 3. dieg.
2. § 15.

THE adjudication which bears the lands, and a general clause, "With all the debtor's right and title therein," is preferable to a posterior one, bearing specially an Annualrent, or other interest competent to the debtor in the lands^e; because creditors cannot particularly know their debtor's rights, and the general includes the special. However, the lands must be described by the parish where they lie, and it is not sufficient to mention the shire only^f.

41. Adjudi-
cation of the
lands in ge-
neral prefer-
able to a sub-
sequent one
of the debt-
or's special
interest.

^e Nov. 21.
1673. Fair-
holm.

^f Dec. 20.
1710. Men-
zies.

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42. Adjudications against apparent heirs, how proceeded in, and their effect.

IN adjudications against an heir, if the heir has made up no title to the subject, he must be served with a special charge to enter heir therein within 40 days, and which must be expired before the summons of adjudication is raised^a; and that whether it is on his own, or his predecessor's bond to which he is subjected by a decree of constitution. The lands must be filled up in the letters of special charge, or otherwise the adjudication is void; because the special charge supplies a special service and infestment thereon, which must contain particularly the lands. If the deceased had only a personal heritable right in him, there must proceed letters of special charge against the heir, to make up a title to that particular right, by serving heir in general, of line or provision, to the ancestor. Such charge is sometimes called a General Special Charge, not without some impropriety; but truly it is a Special Charge against the heir to enter to incomplete heritable rights, *viz.* such whereon the ancestor was not infest. But if the adjudication proceeds on a decree *cognitionis causa*, (of which afterwards^b) no special charge is required. This special charge supplies (in order to support the creditor's diligence) the heir's entry, and without it the adjudication is void; but where he renounces, it can be of no use.

^a Act of Fed. Feb. 18.

^b *Infra hoc tit.*

43. Adjudications regularly do not carry bygone rents; the case is otherwise in those on decrees *cognitionis causa*.

ADJUDICATIONS against an apparent heir, proceeding on decrees of constitution and special charges, carry only the rents and profits of the subjects adjudged from the date of the decree, as other adjudications, and not from the death of the predecessor; because, by a fiction of law, the heir is, on the special charge, holden as entred; and therefore the adjudication can carry no more than if that had been the real case, the rule being, that *Tantum operatur fictio in casu ficto, quantum veritas in casu vero*; The fiction must have the same effect as the reality, and no stronger. The case is otherwise in adjudications on decrees *cognitionis causa*, which, by the heir's abandon of the estate, comprehend the rents that fell due after the deceased's death; for the adjudger comes into the place of the apparent heir, who renounces the whole benefit of the succession in his favour; and therefore the bygone rents, as well as the lands, must belong to the adjudgers, in the same manner as they would to the heir, had he been entred. But other adjudications carry only the rents and profits of the subjects, from the dates of the respective decrees; for, till then, the same belonged to the debtors, and the lands and heritages, and not bygone rents, are only adjudged.

44. Whether a growing crop is carried by an adjudication.

SOME have thought, that an adjudication of lands, in the heritor's natural possession, carries the corns, or other growing crop at the time^c. But I conceive, that an adjudication is not a proper diligence for that purpose; and that growing corns which are moveable, as I have shown elsewhere^d, are only affectable by poinding, as the other moveables on the ground; and the heritor, in such case, is only liable to the adjudger for the rent or value of the possession, as other possessors.

^c Dir. (comprising) et ibid. Stewart
^d B. 1. tit. 3. § 17.

45. Accumulate sums in adjudications bear in-

IN all adjudications, without distinction, the accumulate sums bear interest only from their dates, and this takes place by provision of law, tho' there be no mention of interest in the decree; and the accumulating

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accumulating the sum at a time prior to the date of the adjudication, is no objection against it, that being a loss to the creditor. But if the sum is not only accumulated, but, by the express terms of the decree, made to bear interest from such prior term, one adjudges for more than is due, and therefore his adjudication may be annulled on that head; at least it will be restricted to a security for the principal sum in the bond, and interest of the same; and sometimes the expence in leading it, without the benefit of an expired legal, or accumulations^a.

terest only from the date of the decree; and what if one adjudges for interest from a prior date.

^a June 21. 1705. Inverleith. Fount. March 25. 1707. Innes. June 1728. Corfan contra Maxwell.

AN adjudication regularly ought not to mention the interest of the accumulated sum at all; for it is a judicial disposition of the lands redeemable, and so carries the rents of the same that fall due after its date, and it is the law that substitutes the interest of the accumulated sum in place of those rents, when the debtor comes to redeem. And accordingly apprisings, in place of which these adjudications came, never contained the interest of the sum apprised for, and it has crept into practice by mere abuse, to specify it in adjudications. To examine the case by principles, it would seem, that, to adjudge for the interest of the accumulated sum, even from the date of the adjudication, is a *pluris petitio*, and may be pleaded as an objection to the adjudication, since the creditor cannot have both the rents of the lands which the law gives him, and interest of the sums. And, in redemption of apprisings, if the debtor continued in the possession of the lands, he was liable to the creditor, not only in the sums and sheriff-fee apprised for, but likewise to make good the intermediate rents of the lands, from the date of the apprising till the time of redemption^b. Which, in strict law, would be the case in adjudications; but a more expeditious and equitable rule is followed, *viz.* that, in place of those rents, the interest of the sums adjudged for should be surrogated; for the subjecting the debtor to the rents could only take place when lands were apprised equal in value to the sums; but when the whole came to be apprised at random, it would very often have been intollerable to make the debtor account for the rents.

46. Adjudications ought not to mention the interest of the accumulated sum.

^b Craig, lib. 3. dieg. 2. § 20.

IT is declared, by the statute 1672, introducing adjudications in place of apprisings, that "Superiors and Creditors shall be in the same case, after citation in the adjudication, as if apprising were led of the lands, and a charge given to the superior thereupon." This only takes place in competition with voluntary rights granted after citation, which renders the subject litigious; but will not prejudice legal diligences, such as arrestment, which is preferable upon the current term, to an adjudication led thereafter before the term, unless infestment likewise follow before that period^c, as was observed in the preceeding title.

47. How an adjudger is in the same case, after citation in the adjudication, as if apprising were led, and charge thereon.

^c Newt. decif. 77.

AN adjudication being only a security for the debt, if the creditor do not charge the superior within a reasonable time, to receive him as vassal in the lands adjudged, or insist for possession of the same, but is supinely negligent for some years, an infestment, on a voluntary onerous right interveining, will be preferable, as was the case in apprisings^d; for it were unreasonable that a dormant diligence, which the party may use or not, should be prejudicial to lawful

48. The consequence of an adjudger's neglect to use diligence on his adjudication.

^d Spotswood (comprising) p. 43. in fin. p. 56. versus fin.

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purchasers,

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purchasers, or vigilant creditors, who prosecute their rights, the maxim being, *Jura vigilantibus subveniunt*.

49. The effect of an adjudication before infestment, and of the adjudger's possessing after expiration of the legal.

ADJUDICATION before infestment, is a judicial disposition to the subject; but, if the debtor was infest, the adjudication does not denude him without a charter thereon, and an infestment in the adjudger's person: however, it imports an assignation to the mails and duties, or rents falling due after its date, and needs no intimation. It excludes all voluntary rights granted after the date of the execution of the summons, if the adjudger is not *in mora*, in completing his right. But, if the voluntary right was prior to the citation, infestment may be taken, even after decree of adjudication and charge thereon, and will be preferable thereto^a, as being the first complete right of fee. If the adjudger possesses certain of the lands, after expiration of the legal, his debt is thereby extinguished, tho' the adjudication had become ineffectual as to the rest of the lands, for he thereby acts as proprietor, and is no longer a creditor^b.

^a Decem. 4.
1628. Lagan.

^b Newt. decif.
19.

50. Abbreviates, and the design of them.

AN adjudication is not complete, unless there is an Abbreviate thereof subscribed by the lord ordinary who pronounced it, and recorded within 60 days of the adjudication^c. This came in place of the allowance formerly required in apprisings, instead of the registering them, as above^d. It is a short record of the lands, or other subjects adjudged, containing the names and designations of the adjudger and defender, and a particular of the debts for which the adjudication is led^e. The rule laid down in the statute is, that "those whereof the abbreviates are first recorded are preferable," so that the want of it is not an absolute nullity; and therefore the lords of session, on special application, will allow the abbreviate to be signed and recorded, even after expiration of the 60 days, for it will thereby be preferable to others recorded thereafter. But such as are not duly recorded will not be allowed the privilege of coming in *pari passu* with the first effectual adjudication, tho' within year and day of it, unless there are abbreviates of them registered within that period^f, because they must be formal and complete. The abbreviate contains a warrant for letters of horning against the superiors; but for which there is no occasion, where the debtor was not infest; but still there must be an abbreviate of them duly recorded, the primary intent of which is for intimation, and it is enjoined in all, without distinction, whether the debtor was infest or not.

^c Regul. 1695.
art. 24. additional regul. art. 3.
^d P. 1661.
c. 31.

^e Regul. 1695.
act 24.

^f Hume decif.
88.

51. Two or more principal abbreviates may be obtained.

THE abbreviate was in use to be taken back by the adjudger, after it was recorded; and, if it happened to be lost, it was a doubt, if an extract from the record would be sufficient, since the regulation enjoins, that it be signed by the pronouncer of the decree. To remedy which inconveniency, it is ordained by act of federunt, that a principal abbreviate signed by the judge, pronouncer of the decree of adjudication, shall be retained by the clerk, to be the warrant of any extract that may thereafter be wanted. And for the adjudger's farther security, that the judge shall sign two or more abbreviates, as the party desires, that he may have, in his own possession, one or more principal abbreviates^g.

^g Act of fed.
Jan. 18.
1715.

INFESTMENT

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INFESTMENT no doubt perfects the adjudication into a right of property: but, in respect that it is expensive to insist for infestment, and that possibly the superior may decline it, in which case the course after mentioned is to be followed: therefore, it is declared by statute, that an adjudication shall be effectual and preferable to all others, not only by infestment, but likewise by a charge given to the superior, for granting infestment^a, which proceeds on the horning raised on the warrant in the abbreviate. But, if the adjudger intends effectually to be infest, he must not only charge the superior, but likewise therewith present a charter to him to sign, with a year's rent for his entry; and, if the superior refuse to receive the adjudger, he must take instruments on the refusal, and thereupon he will obtain, on a common bill, letters to charge the next superior, and so on till he arrive at the king, who refuses none; and by this means the immediate superior loses the casualty of non-entry during his life. And, if the superior is not entered to the superiority, the same course may be taken with him, as in the case of refusing to enter an heir. This was the ordinary method in Sir Thomas Craig's days^b, and is necessary still, when the adjudger finds it his interest to be entered, and the superior is obstinate in refusing to receive him, or is not in capacity to do it. At the same time, summary diligence may proceed against the immediate superior, upon the horning against him; and indeed, by the late statute^c, at the instance of a disponent, on producing a disposition, containing a procuratory of resignation, and tendering a year's rent for his entry. And, I conceive, that in both cases, on the refusal of the immediate superior, there must be access to the next, in order to the heir's, adjudger's, or disponent's infestment; for that is absolutely necessary for vesting the feudal right, which cannot be effected by any personal diligence.

^a P. 1661.
c. 62.

^b Lib. 3. dieg.
2. § 20.

^c 20 Geo. II.

^d P. 1672.
c. 19.

^e March 30.
1637. Pater-
son.

^f Spotswood
(comprising)
p. 55. in fin.
Scot. id.
p. 56. Cowan.

By the statute^d, adjudgers must be received on payment or tender of a year's rent, with a charter, and all personal diligence may proceed to compel the superior to receive them, or they may insist to be entered by the next superior, as aforesaid. Where there are more adjudgers within year and day of the first, one year's rent will be sufficient, as one infestment is communicable to all; and, if the sum adjudged for is small, and the rent very great, the court of session will modify the entry below a year's rent^e. If the lands adjudged belong only in superiority to the debtor, his superior is intitled to no more than a year's rent of the feu-duty, to which only the adjudger is to have right when entered; and, if they are subject to a liferent holden of the superior, the year's duty will be superceded till the liferenter's death^f. In adjudications of lands holden immediately of the crown, no year's rent is exigible by the barons of exchequer, at passing the charter, which is compounded for according to the stated rules of exchequer; for the lieges are all alike the king's subjects, and therefore, there is no reason for exacting a composition for the change of the vassal.

52. What the effect of a charge on an adjudication; what course must the adjudger take to obtain himself infest.

53. The year's rent, due by the adjudger for entry, varies according to the debtor's interest in the subject; not due in lands holden of the crown.

THE charge against the superior renders an adjudication effectual, as if infestment had been taken upon it, only in competition among adjudgers; for, in questions with voluntary rights, prior to the citation in the adjudication, the first infestment actually taken is the rule

54. The effect of a charge against the superior; is it considered in rule

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questions
with volun-
tary rights.

rule of preference, in the same manner, as if both were voluntary rights; so that the infeftment on the first effectual adjudication, in such case, is only available to the adjudger infeft, but not to those within year and day of him, to whom, if not infeft, the disponente infeft will be preferable. This, in such case, makes it necessary for all the adjudgers to take infeftment, and the superior ought to refuse none; but then he is intitled only to one year's rent for an entry from all^a: however, an adjudger frequently contents himself with the charge, to render his adjudication effectual, without proceeding farther. The effect therefore of this charge against the superior, only, is, that all adjudications led within year and day, of that which is made effectual by such charge, are brought in *pari passu*, as if one adjudication had been led for all. The year is counted from the date of the adjudication, and not of the charge, and by return of the same day the next year; but it has not the effect of an infeftment in other respects. Thus, the superior is not thereby prejudiced of his casualties, unless he was *in mora*, by refusing infeftment, after not only charging him, but likewise offering him a charter to sign, with a year's rent for the entry^b. Nor will one that had a voluntary right, prior to the adjudication, be thereby hindered from perfecting it by infeftment. Nor does it exclude the widow from the terce^c, because the debtor still remains fiar.

^a July 22.
1628. lord
Borthwick.
Gilm. decis.
12.

^b June 28.
1667. Dou-
glas. Feb. 9.
1669. Black.
July 4. 1671.
Balfour. Jan.
26. 1681.
Bangour.
^c Hume decis.
48. id. decis.
56.

55. Adjudi-
cations, with-
out year and
day, are pre-
ferable, ac-
cording to
their dates.

AFTER an adjudication is made effectual, and year and day expired, all subsequent adjudications are preferred according to their dates. Wherefore the one that is first led, after expiration of the year and day, is preferred next to those within the year and day: and other adjudications, thereafter led, must take their place according to their dates; because they only adjudge the reversion that shall remain after the preceeding ones are satisfied, as was the rule in all cases, before the act 1661.

56. How does
the superior
make effectual
his adjudica-
tion of the
vassal's es-
tate.

WHERE the superior adjudges his vassal's estate, he cannot make his diligence effectual by a charge against himself, otherwise than in the name of a trustee. Before the act 1661, in such case the superior was preferable, by his simple apprising of the vassal's estate, on this ground, that, by the apprising, the fee was supposed to be consolidated with the superiority^d. And therefore it may seem, that the adjudication, at the superior's instance, is to be holden as effectual from its date, in the same manner, as where a personal right is adjudged, which needs no charge to make the adjudication effectual. And it is the doctrine of some of our best lawyers, that an apprising, at the superior's instance, (in place of which an adjudication now comes) is equivalent to a disposition and resignation thereon, and consolidates the property with the superiority^e. But I have elsewhere endeavoured to show, that this opinion is not well founded^f.

^d Spotswood
(comprising)
Feb. 13.
1624. Steven-
son.

^e Dir. verbo
(consolida-
tion) et ibid.
Stewart.
Spotswood
(apprisings)
Stevenson.
Stair, lib. 3.
tit. 2. § 22.
^f B. 2. tit. 11.
§ 14.

57. The con-
sequences of
the commu-
nication of
the first ef-
fectual adju-
dication to
those within
year and day.

INFESTMENT or charge against the superior on the adjudication, which is thereby made the first effectual one, is *ipso jure* communicated to all those that are within the year and day of it; so that the first adjudger cannot pass from it to their prejudice. Nor does it alter the case, that the first effectual adjudication comes into the person of a singular successor, or that it is satisfied by payment or intromis-
sion;

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fion; for it still subsists to the behoof of the rest, within year and day of it, in the same manner as if their debts had been therein included, and therefore it is a common right. Nor will they be excluded from claiming the benefit, tho' the legal of it is long expired^a; unless it is secured by the positive prescription, whereby it becomes an absolute right of property. However, the others, before they are admitted to participate of the benefit, must refund the whole expences of the first effectual adjudication and infeftment, or charge thereon, and interest of the same, as a consideration for allowing them to partake of the diligence; which, by the former law, would have excluded them, till it was redeemed. None of those, within year and day, can pursue a removing against tenants without the rest, unless he find caution for the rents, or offer a better tenant, or greater rent^b.

^a Hume (adjudications)
June 23.
1720. Barclay.

^b Jan. 28.
1676. MacLurg, Nov.
17. 1679.
Straiton.
Jan. 16.
1680. Anonymus.
Newt. decis.
5. Hume
decis. 19.
^c Hume (adjudications)
Nov. 19.
1734. Tack.
^d Hope pract.
observ. tit. 9.
§ 13.
^e P. 1661.
c. 31.

If the subject adjudged is not a right perfected, by infeftment, in the debtor's persons, the adjudication requires no charge against the superior to perfect it, since the superior can grant no infeftment pursuant to such charge: and consequently all adjudgers, within year and day of the first adjudication of such right, come in *pari passu* with it, as being of itself effectual, as was above hinted^c. And, for the same reason, there was no necessity of old for the Allowance of the court of session to apprisings of such subjects, the only intent of the allowance then being, to obtain a warrant for charging the superior to receive the appriser vassal in the lands^d. But, after the registration of apprisings was taken away, the allowance was ordained to be recorded by statute^e, which extends to all apprisings. So that the use of the allowance became not only a warrant to charge the superior, but likewise to serve as a publication of the apprising.

58. If no charge is necessary, the year and day computed from the date of the decree.

AFTER the legal reversion is run, the adjudication becomes expired and irredeemable, and infeftment thereon renders it, in a proper sense, a right of property, if the adjudication is unquarrellable; but still, in all competitions, the adjudication itself, and grounds of debt, must be produced any time within the positive prescription. However, the warrants or general charge whereon the decree of constitution proceeded, or the special charge, with their executions, need not be produced, if it was not called in question for 20 years^f. Where an heritable bond is adjudged of much greater value, perhaps, than the sum adjudged for, the same notwithstanding will be carried by the expiration of the legal. But even thereafter, a conscientious creditor will allow the debtor the benefit of redeeming it, on payment of what is justly due to him: as likewise such person will not carry off a great land-estate, for a small sum, by an expired legal. There is this difference between the two cases, that the property of lands ought, for the public good, to be fixed and ascertained within a certain period; whereas, in the other case, there is a kind of compensation between the sum adjudged, and that adjudged for; and therefore the creditor-adjudger would seem in equity to have no right to the overplus, and ought to refund it.

^f Feb. 11.
1681. Kennoway.
Hume decis.
63.

59. Infeftment on an expired adjudication becomes an absolute right of property; what if the subject adjudged be an heritable bond.

A BACKBOND, or other personal deed, by an adjudger or his assignee, qualifying the right, will no doubt be good within the legal,
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60. The effect of a backbond granted by an ad-

even

Judger or his
assignee.

even against an onerous singular successor infest on the adjudication; because it is only a judicial right of lands redeemable, and therefore must be affected by the personal deeds of authors; even tho' the backbond had not been registred in the register of reversions, nor inhibition used on such deeds, or the matter rendered litigious before the purchase. For a backbond of reversion granted by a disponsee to lands, was good, by express statute^a, against his onerous singular successors, before the act 1617, ordaining backbonds (for reversions are such) to be recorded within 60 days of the seifins, upon the dispositions to which they relate, in order to have that effect; and the later act referring only to voluntary rights, the law is still the same as before, with respect to adjudications, to the above effect; and which is established by a current of decisions^b.

^a P. 1469.
c. 27.

^b July 3.
1666. Earl
Selkirk.
July 6. 1676.
Gordon.
July 12.
1670. Ken-
nedy.

THE case is otherwise, if the adjudication is expired and completed by infestment; for then the purchaser obtaining himself infest, his right of property is absolute, and not controulable by any personal deeds of his author, more than in the case of a conveyance of a voluntary right of lands, for in both cases the purchaser, who acts on the faith of the records, is safe. Indeed payment within the legal, by intromission with the rents of the subject adjudged, will no doubt extinguish the adjudication to all intents; not only in prejudice of the adjudger that intermeddles, but likewise all singular successors to him, whether infest or not, and at whatever time the defence is proposed, unless the party be secured by the long prescription; for that being the natural way of extinguishing an adjudication, the purchaser is understood to take his hazard of it.

61. An adjudication and the bygone interest fall to the heir, and not to the executor.

By an adjudication, the lands and rents of the same belong to the creditor, redeemable indeed by provision of law, on payment of the accumulate sum, and interest of the same within the legal. And consequently the adjudication itself, *i. e.* the right of the lands, falling to the heir of the creditor, it must carry the whole bygone interest; which, and the accumulate sum, are payable to him alone, on redemption of the lands from him; and no part of the interest falls to the executors of the adjudger, who have no right to the reversion^c.

^c Feb. 3.
1738. Ram-
say.

62. How redemption of adjudications, and declarator of the same, proceed.

ADJUDICATIONS may be redeemed, at any time within the legal, by the person who has right to the reversion his using an order of redemption, by premonishing the adjudger to come and receive his money, at any time or place convenient, (for the law prescribes none) and that, in default thereof, the money shall be consigned. In pursuance of this premonition, the adjudger either receives his money, and renounces the adjudication, in which case it becomes extinct; or, in default thereof, the money is consigned, and a declarator of redemption, in consequence of the order duly used, must be sued, and a decree thereon obtained; but even, without such action, the legal is still kept open, by using the order of redemption. An order, being used by any one of the debtors, saves the currency of the legal to all; because the creditor cannot evict the estate of any of the debtors for a debt, whereof tender was made to him in due time.

63. The effect of an order of re-

A DECLARATOR of redemption, pursuant to the order, effectually extinguishes the adjudication, tho' perfected by infestment, which is only

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only a security for the sum, and therefore must vanish when the sum is paid, or thro' the creditor's fault consigned. But tho' properly it is the order, and not the declarator, that extinguishes the adjudication; yet, even after the order is duly used, the sum consigned falls not to the executors of the adjudger, but to his heir, unless the deceased had either acknowledged the consignment, or declarator of redemption had past against him; because, till then, the debtor may pass from the order, and take up the consigned money^a, as was observed in redemption of wadsets^b. An order of redemption used within the legal, no doubt, keeps it open; but, if the adjudger is in possession, a summons of count and reckoning, or declarator of extinction of the adjudication raised within the legal, and effectually prosecuted, will hinder the adjudication to expire; it being impossible for the reverser, in that case, to know what is resting; and the expiration of the legal is odious^c.

demption,
and declara-
tor thereon,
in adjudica-
tions.

^a Feb. 10.
1675. Tor-
woodhead.
Feb. 20.
1679. Mor-
ton.
^b B. 2. tit. 10.

^c July 2. 1675.
Kincaid.

^d Hume (com-
pensation)
June 30.
1738. Rae.

In a competition among the adjudgers, any of them may propone compensation against another, upon a debt due by him to the common debtor, tho' omitted in the decree^d. For the old statute, which enjoins compensation to be proponed before decree, does not concern the interest of third parties, but only the defender himself, that he may not vexatiously wave it, in order to a suspension.

64. How far
compensati-
on good a-
gainst a debt
adjudged for.

DECLARATORS of expiration of the legal are ordinary, and where the adjudger is in possession, such process is adviseable for removing all Questions touching his being satisfied within the legal: but in other cases it seems to be a fruitless action, for the law declares the expiration of it without any action for that purpose. Which is otherwise in temporary conventional reversions, wherein there is still place for redeeming till declarator of the irritancy of the reversion is obtained, as is observed in the proper place^e.

65. Declara-
tor of expiry
of the legal,
how far use-
ful.

^e B. 2. tit. 10.

If an adjudication, which is expired, is purchased by the apparent heir of the debtor, either before or after his predecessor's death; or which becomes expired in his person, the creditors of the deceased, even without adjudging, may redeem the lands from him within ten years after his right is presumed to be known, by infeftment or possession thereon, upon payment of the sums he paid for it; or, if the right was gratuitous, of the sums in the adjudication: and his possession of the rents will be imputed in extinction thereof, so far as they go: this new and second legal will be kept open in the same manner as the first^f. This expedient was necessary, because frequently apparent heirs transacted with a creditor that had the most sovereign rights on the estate, and thereby possessed the whole to the ruin of all the other creditors. And the case of creditors in these circumstances being most favourable, the court of session found it competent to personal creditors, to redeem apprisings so purchased, and that even tho' the purchase was made in the predecessor's life; notwithstanding that the statute seems, by its words, not to reach to those cases; nor indeed to the case where the apprising becomes expired in the person of the heir^g. The rule for interpreting laws, especially those introduced for preventing of frauds, is *Quoties lege unum aliquid aut alterum introductum est, bona occasio est, cætera quæ tendunt ad eandem*

66. Adjudi-
cations, pur-
chased by an
apparent
heir, redeem-
able in ten
years after
the right is
made pub-
lic.

^f P. 1661. c.
62. June 19.
1668. Bur-
net. July 14.
1671. Max-
well. Feb. 13.
1673. Max-
well.

^g Dd. decis.

dem

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dem utilitatem, vel interpretatione, vel certe jurisdictione suppleri^a, viz. that beneficial laws be construed so as by a parity of reason to be extended to parallel cases, and may be applied here.

^a L. 13. ff. de legibus.

67. The farther effect of such purchases, either by the apparent heir himself, or those to whom he is likewise apparent heir.

AND now, if the apparent heir possess the predecessor's estate, or part thereof, by rights redeemable or irredeemable, otherwise than as purchaser at a public roup before the lords of session, his possession is declared a passive title sufficient to make him represent his predecessor universally, in the same manner as if he were served heir to him^b. Wherefore, by our present law, adjudications coming into the person of the apparent heir, and he possessing thereon, become extinct *confusione*. By a clause in the same act "where rights or diligences affecting the predecessor's estate, shall be found settled in the person of any such near relation to whom the apparent heir to the fore said predecessor may likewise succeed as heir, the apparent heir's possessing by virtue of the said rights and diligences, (except upon lawful purchase by public roup) is not only declared a passive title; but likewise those rights and diligences in the person of the near relation are only valid to exclude the predecessor's creditors, in so far as can be instructed, that these rights and diligences were truly and honestly purchased for payment of sums of money, and no further." There is here a perpetual reversion granted to the creditors of the predecessor, with respect to the rights and diligences in the person of a near relation, to whom the apparent heir may likewise succeed, and by virtue whereof he possesses the predecessor's estate.

^b P. 1695. c. 24.

68. How does the legal run against a minor; what time has his heir, major or minor, to redeem after the minor's death.

THE legal is likewise prorogued, by express statute, during the whole years of minority of the reverser, which, in this case, extends to the age of 25 years complete, including the *quadriennium utile*^c. By this act the adjudger had right to the whole rents for his interest, after expiration of the legal, without being accountable for the overplus. This was corrected by a subsequent statute^d, which provides, "That minors shall have right to the overplus rent, beyond the interest of the sums adjudged for, during their minority of 21 years;" for which time it is there said the legal continues. This seems to be erroneously mentioned instead of 25 years, for otherwise the adjudger will still retain the overplus rent, during the four subsequent years of the 25, within which time the legal is still current by the first act, the benefit whereof was not intended by the subsequent one to be limited, but the privilege to be extended in favour of minors: *Et quod in alicujus favorem inventum est, non detorquendum est in ejus læsionem*; what is introduced in favour of one, is not to be strained to his prejudice^e. And therefore this act is to be interpreted by the preceeding one, and the benefit thereby introduced must extend to the party's age of 25 years complete.

^c P. 1621. c. 6.

^d P. 1663. c. 10.

^e L. 25. ff. l. 6. c. de legibus.

If a man die before his age of 25 years, and another minor succeed to him, he has the benefit of redemption till his own age of 25 years. But, if a major succeed before the original legal was expired, then he is almost in the same case as if the adjudication had been led against himself, and can only redeem during the years of the legal that did not run in the minor's time. And, if the original legal was

was

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^a P. 1621.
c. 6.

was expired before that period, the major succeeding has year and day after his succession, by the minor's death, to redeem^a. And, by the same rule, if the legal had near expired in the minor's life, the major succeeding to him has a full year and day, after the minor's death, to redeem the adjudication, tho' so much of the legal did not then remain.

^b Tit. (legal
reversions
competent to
idiots) et
ibid. Stuart.

A DOUBT is moved by lord Dirlton^b, whether, if a madman or idiot have right to a legal reversion, he has the benefit competent to a minor, to redeem after his recovery, or the heir after the idiot's death: and he answers in the negative, because, by our law and custom, before the act 1621, minors had not that benefit; and, by the statute, it is only given to minors, *Et exceptio firmat regulam in casibus non exceptis*; and statutes cannot be extended. Nor is there the same reason, since the time of minority is defined; whereas, a madman may never recover, and an idiot may live a very long time; and it were hard that the creditor should be uncertain, all that time, as to his right and dominion, whether it be absolute or redeemable. Sir James Stuart, upon this title, differs, and thinks, that a furious person, or an idiot, should have the benefit, competent to a minor, to redeem after his recovery. But, with submission, his reasons are not sufficient to over-balance those given by Dirlton, I shall only add, that an idiot, or natural fool, never recovers, as is observed by naturalists; so that 'tis needless to put the question, whether he may redeem after his recovery, since the law does not presume that he shall recover; and therefore, it ought to be put, whether the heir of an idiot can redeem after the death of the idiot? And, as commonly the next heir has the tutory, he may blame himself if he does not redeem within the legal. And the same may be said in relation to a furious person or madman, who is likewise committed to the tutory of his next agnat. And, if any other guardian suffers the legal to expire, when he could redeem, he is liable in damages to the party aggrieved, or his heir.

69. The case of an idiot or madman, as to redemption of adjudications.

^c Feb. 9. 1639.
Hamilton.
Jan. 4. 1662.
Seton. Jan.
20. 1681.
Burnet.
^d Feb. 10.
1674. Blyth.

ADJUDICATIONS within the legal may be extinguished, by payment of the sum, for then the security must fall; or by intermeddling with the rents within that time, to the extent of the accumulate sum, as above; for all adjudgers, regularly, have their option to possess or not. If they possess within the legal, they are accountable for the rents, conform to the rental, the victual-rent being counted at the sheriff-fiars, (not the commissars) from the time their possession was peaceable, with deduction of all burthens and necessary defalcations. But, if they are disturbed in the possession by the debtor, *via facti*, or *via juris*, they are only bound to account for what they actually receive during those years; and, so soon as they return to peaceable possession, they again become accountable by a rental^c. They are equally liable to diligence with factors, and if one has right to several adjudications, his intromission with the rents will primarily be applied to the first, or to such from whence there is the greatest danger to the debtor, that the legal may be saved from expiring^d.

70. Adjudications within the legal, how extinguished; how far adjudgers accountable for the rents.

AN adjudication was likewise found extinguished, by a bond assigned, during the legal, by the debtor to the adjudger, even in pre-
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71. An adjudication extinguishable

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by a bond assigned to the adjudger, during the legal.

judice of a singular successor^a. This was in the case of an adjudication within the legal, and before infeftment. And, by the same rule, such adjudication is extinguishable, even against an onerous assignee, by any just defence that lay against the cedent, during the legal, as in the case of a merely personal debt.

^a July 26. 1745. lady Crowden-knows

72. An adjudger bound to possess; if he obstructs others, his possession may be restricted to his interest.

If a preferable adjudger, in a competition for mails and duties, or rent of the lands, debar others, he is bound to possess, and is accountable for the rents^b. The court of session, however, by a clause in the act 1661, may restrict adjudgers, during the legal, to rents equal to their interest, which provision is found to be a perpetual law, extending not only to apprisings then led, but likewise to those in time coming; and, in consequence of the statute 1672, to adjudications that came in place of apprisings^c.

^b Feb. 11. 1636. Colquhoun.

^c Newt. decif. 84. Feb. 10. 1675. Torwoodhead.

73. The adjudication being satisfied, the reverfer's right stands good.

As soon as an adjudication is satisfied, the debtor's right revives, and is in the same case, as if it had not been led. One that possessed on an adjudication that was expired, but thereafter the legal opened, is accountable for the rents only, so as to impute them to his own payment^d. But thereafter, till he was challenged in a proper action, he will be found *bona fide* possessor, not liable to restore; because he truly possessed as absolute proprietor, till his diligence was opened: and the rents, after his debt is satisfied, are *Fructus bona fide percepti*.

^d Hume decif. 18.

74. How does the adjudger make the subject effectual, after expiration of the legal, for his payment.

If an adjudger dispoise the lands, after the legal is expired, he thereby accepts the same, in payment of his debt, tho' the price should come far short of it; and therefore cannot thereafter affect any other subjects belonging to the debtor for the residue, more than if the lands adjudged had been given him *in solutum*, or in payment of his debt. But otherwise the expiration of the legal cannot bar the adjudger from his full payment, imputing thereto the lands adjudged, according to their value, either by selling the lands with the debtor's consent, or bringing them to a sale before the court of session. And it has been observed already, that the adjudger's possessing, after expiration of the legal, part of the lands adjudged, excludes him from all farther demand, tho' the rest had been evicted, so that they are holden as taken *in solutum*, by such possession, even without disposal.

75. Adjudications, and infeftments thereon, liable to challenge at any time within the positive prescription; and to what effect defective ones are sometimes sustained.

ADJUDICATIONS, and infeftments thereon, may be questioned at any time within the years of the positive prescription, as above, in a reduction at the instance of the debtor, or his heirs, or other creditors adjudgers. If the adjudication is essentially defective, or led for more than was due, by the party to whom the partial payment was made, it will be wholly annulled. But, for small informalities, the court of session only open the legal, and sustain the adjudication for the accumulate sum, and interest from the date of the adjudication; or they restrict the adjudication to a security only for the principal sum, interest and necessary expences, and sometimes without either accumulations or expences, as above hinted. It is much in their arbitrement, how far an adjudication, liable to objections, shall be annulled or restricted; but a very small informality will give occasion to open

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^a June 20.
1678. Scot.
July 20.
1678. Mor-
rice. July 3.
1707. Dun-
can. Spotf-
wood (com-
prisings)
p. 52. Earl
Kinghorn.
^b Feb. 15.
1745. Ram-
say.
^c P. 1700.
c. 3.

open the legal^a; as I have observed, in the case where the accumu-
late sum is made, by the decree of adjudication, to bear interest be-
fore its date. When an adjudication has been long the subject of dis-
pute, the not producing the bond whereon the decree of constitu-
tion proceeded, or some of the mid-couplings, will not be regarded,
if, during such litigation, no complaint was made by the adverse par-
ty, that the same were wanting^b.

By express statute^c, adjudications, in the persons of profest papists,
can only subsist for principal sum and interest, and the legal never
expires; but, when it comes in the person of a protestant, it expires
within year and day thereafter, in case the ordinary legal was run
before he was vested with the right.

76. Adjudi-
cations led
by papists,
how do they
expire.

If an adjudger of ward-lands was infest, and in possession, the
ward and marriage of the heir, being minor, did fall by his death,
either before or after the expiration of the legal: and the case is the
same as to non-entry, nor could that damage be charged to the ac-
count of the debtor, since it arose on the part of the adjudger. But
these casualties did not, in such case, fall by the debtor's death, who
truly was not vassal. If the adjudger was not in possession, the ca-
sualty of non-entry cannot fall by his death, since, by not assuming
the possession, he waves his right for the time: and the same will
take place by the debtor's death, in the same manner, as if no ad-
judication had been led; for it is only a collateral security, which the
creditor may use or not at his pleasure.

77. In what
cases do the
casualties
fall by the
adjudger's
death.

SECTION V. Other Adjudications, not founded on the act 1672.

I HAVE hitherto treated of adjudications that came in place of ap-
prisings. I shall now touch upon other adjudications. A creditor
cannot regularly adjudge for payment, till the term of payment of
his bond elapse. But, on particular occasions, adjudications in secu-
rity are competent before the term; as if the debtor is *Vergens ad
inopiam*; or there is danger, that otherwise the creditor shall not get
his adjudication led within year and day of the first effectual one^d.
A widow may likewise adjudge for security of her life-rent-annuity,
during her life, and a cautioner may adjudge for security of his re-
lief, before he makes payment, and so may a purchaser or creditor
for security of his warrandice. There is nothing peculiar in these,
but being in security only, the reversion is perpetual^e.

78. Adjudi-
cations, simp-
ly in securi-
ty; they ne-
ver expire.

^d July 12.
1711. Blaw.

^e Newt. decif.
75.

^f P. 1621.
c. 7. P. 1669.
c. 18.
^g Lib. 3. dieg.
2. § 23. 24.

ADJUDICATIONS on decrees *cognitionis causa* were in use while
apprisings were in vigour, and are still continued in the same state^f.
The learned Craig acquaints us, that, at the time of his writing,
they were then recently introduced by the court of session^g. All
that is considerable in them is, that, after the heir has renounced
upon the general charge, which founds the decree *cognitionis causa*,
he needs not be specially charged to enter heir in the lands; for he
having already renounced to be heir, that were inept. But the *hære-
ditas jacens*, or the heritage of the ancestor, which is not taken up by
the heir, but renounced in favour of the pursuer, is adjudged; and
it

79. The par-
ticularities
in adjudica-
tions on de-
crees cogni-
tionis causa.

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it may be done on the same summons. They required no abbreviate, more than they did an allowance, until the regulation 1696, enjoining abbreviates to such adjudications, which may seem to concern only those led before the lords of session, as for most part they are. However, since that regulation, such adjudications before the lords, or inferior courts, are in the same state as other adjudications, in respect to abbreviates^a. And the inferior judge, who pronounces such adjudication, signs an abbreviate of it, which must be duly registred in the records of abbreviates at Edinburgh, in the same manner as if they had been carried on before the court of session.

^a Regul.
1696. art. 3.
Fount. Dec.
29. 1696.
Murray.
Decem. 23.
1709. credi-
tors of Mar-
shal. Decem.
1731. Drum-
mond.

80. Adjudications, on decrees cognitionis causa, may be carried on before the judge ordinary.

THESE adjudications, and none of any other kind, are competent before the judge ordinary, within whose jurisdiction the subjects adjudged lie, as just hinted; because they were the same with apprisings; with this only variation, that, since the heir did not concern himself with the estate, the whole was always adjudged; and not a proportion corresponding to the debt, as was the case of apprisings when they were first introduced. And, for that reason, I conceive, when they were authorised by the lords of session, they obtained the name of Adjudications. The act 1672, which provides, that adjudications shall be led before the court of session, concerns only the adjudications thereby introduced in place of apprisings; but not the adjudications that were in use before that statute. And as such adjudications were founded by the authority of the court of session, so they were most frequent before them from the beginning^b, as they are at this day.

^b Spotswood
tit. (adjudi-
cations)
Craig, lib. 3.
dieg. 2. § 8. et
23.

81. By whom are adjudications, upon decrees cognitionis causa, redeemable.

ADJUDICATIONS of this kind are redeemable by the next apparent heir of the predecessor last infest, in case the reversion happen to devolve to him, but not by the apparent heir that renounced, unless he is reponed against the renunciation^c. He may however easily remedy himself, by adjudging the lands in a trustee's name, upon his own bond; for then he is intitled, as a creditor, to redeem from him, in whose favour he had renounced. And, tho' such trust did appear, yet the redemption would be allowed, it being *jus tertii*, and no prejudice to the creditor, more than if it were for the trustee's own behoof. It appears from the statute 1621, that such adjudication was not of old redeemable, even by a co-creditor of the deceased debtor, or a creditor of the heir that renounced. Which is remedied by that statute, allowing them, on adjudging, to redeem within seven years, as in apprisings, and which, by the act 1661, was prorogued to 10 years, as the legal of apprisings was^d.

^c Jan. 27.
1680. Mac-
Aulay. D.
P. 1621. c. 7.

^d P. 1661.
c. 62.

82. The other peculiarities of such adjudications.

AN adjudication of this kind, even led before an inferior court, becoming effectual by infestment or charge against the superior, will exclude all others, tho' deduced before the lords of session, that are not within year and day of it: for, by a clause in the act 1661, that privilege is declared to extend to adjudications *for sums of money*, which must be understood of those upon decrees *cognitionis causa* for sums of money, in exclusion of adjudications *ad factum præstandum*, or in Implement. These carry all the mails and duties, or rents that fell due after the predecessor's death, the same being *in hæreditate jacente*; for

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for the estate is adjudged, as it was at the time of the ancestor's death^a, the same being renounced in favour of the adjudger.

^a Jan. 19.
1669. John-
ston. Jan. 4.
1709. Ker.
Decem. 23.
1709. credi-
tors of Mar-
shall.

WHEN one disposes lands without procuratory of resignation, or precept of seisin, then it is absolutely necessary, for completing the right, that an adjudication in implement (or *ad factum præstandum*, as it is sometimes called) be led against the granter, or his heir, in order to denude them. This could not of old be done, till the party was charged with horning, and denounced for disobedience to the charge, that it might appear that this remedy was necessary, which was introduced by the court of session to supply the execution of the law; but that, being an useless formality, was discontinued. Adjudications of this kind were brought into practice long before the act 1672, and have no foundation in that statute; and, being a matter of eminent jurisdiction, were only competent before the court of session. Where such adjudication is led against the party himself, it proceeds upon the obligation to infest the pursuer in the lands. And if such adjudication is necessary against the heir, there must be a previous decree obtained against him. If the heir in a process against him, at the instance of a disponent, on a charge to enter heir, renounce, then a decree *cognitionis causa* proceeds, and the right, as in *hereditate jacente*, is of course adjudged, and the superior thereafter, as in other adjudications, may be charged with horning to receive the disponent-adjudger, upon payment of an year's rent, as a composition for his entry. The superior, in the case of an adjudication in implement, is not obliged to receive the adjudger, unless he show his author's right; because, 'tis presumed, that one who voluntarily disposes would deliver to the disponent his rights to the lands, if he had any^b. Whereas debtors frequently abstract the rights of their estates, in prejudice of creditors-adjudgers, who therefore are not bound to produce them to the superior, in order to their entry.

^b June 24.
1663. Mac-
Doual.

83. Adjudica-
tions in im-
plement;
what their
particulari-
ties.

AN adjudication in implement has no reversion, other than as is contained in the disposition, or right, in implement whereof it is obtained. It is termed likewise an Adjudication *Ad factum præstandum*, being originally to supply the fact of granting a procuratory of resignation, or precept of seisin, in order to the disponent's being infest. But it was frequent, even where such clauses were contained in the disposition, to adjudge, upon the obligation from the disponent to infest the disponent; because, if the superior was refractory, no infestment could, with safety, proceed in ward-lands, without such adjudication; nor in any case holding of the granter's superior, by a public infestment, which is the most perfect holding, the superior not being compellable otherwise to grant the infestment. But now that is remedied by the late statute^c, authorising charges against superiors to receive disponents, on right containing procuratory of resignation, upon a tender of the composition for an entry. Wherefore adjudications in implement are only necessary at present, when the disposition wants a procuratory of resignation for infesting the disponent, according to the original design of them.

84. The rea-
sons for in-
troducing
adjudicati-
ons in imple-
ment.

^c 20 Geo. II.

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85. How adjudications in implement are made effectual.

THO' this adjudication is not of the nature of that introduced in place of apprisings, by the act 1672; nor of the old adjudications for debts upon decrees *cognitionis causa*, and consequently cannot be regulated by the act 1661, as to its being made effectual by a charge against the superior; yet it was found, that in competition between two adjudications in implement, that, whereupon a charge had proceeded, was preferable to the other, on which none had been given^a. But that can only hold, where the adjudger in implement not only charges the superior, but likewise, with the charge, offers a charter to the superior to be signed, together with an year's rent for his entry; and, if that were not sufficient, adjudications in implement might be rendered ineffectual. Wherefore this does not proceed on the act 1661, but from the necessity of the thing, and upon the principles of our common law, whereby an adjudger, in such case, is holden as infest, in questions with the superior himself who refuses to infest him; or with others who are not infest, nor have used any diligence for that purpose. And, by the same rule, the competition between two disponees to the same lands, neither of whom was infest, but one or both had charged the superior to receive them, pursuant to the late act, must be determined.

^aFount. June 21. 1704. Sinclair.

86. Such adjudication admits of none to come in within year and day of it.

THIS adjudication cannot, from the nature of the thing, admit of other adjudications, led within year and day of it, *pari passu*^b; more than the disponee can be obliged to communicate his disposition to them, towards compleating whereof he only adjudges. And the provision in the act 1661 only concerns creditors in sums of money, adjudging within year and day of the first effectual one, that they shall all be preferred proportionably; because, otherwise, the first might carry off the whole estate to the prejudice of the rest, which cannot affect adjudications in implement.

^bDecem. 12. 1677. la. Frazer.

87. How the competition between such adjudication, and these for sums of money determined.

THOSE adjudications, regularly, not being made effectual by a charge against the superior, such charge, on adjudications for sums, will not be regarded in a question with them. And in competition between such adjudications, and those for liquid sums, the first infestment gives the preference, without respect to the priority of the adjudications, or charges thereon, these being only incomplete real rights^c. Provided always, the disposition, or other right, in implement whereof the adjudication is led, be prior to the citation in the adjudication for sums of money; for otherwise, if such adjudger for sums was not *in mora*, he will be preferred.

^cDecem. 12. 1677. lady Frazer.

88. What rights may be thus adjudged.

NOT only a right of fee, but likewise an annuity, annualrent or liferent, may be thus completed by adjudication, in order that the parties interested therein may be duly vested with the right^d; and the charter of adjudication in implement will accordingly be limited to such interest. And, by the late act^e, a disponee to an annualrent or liferent, whose right contains a procuratory of resignation, may charge the superior to receive him, without previously adjudging, in the same manner, as in the case of a disposition of lands.

^dDecem. 12. 1677. lady Frazer.
^e20 Geo. II.

SECTION VI. *The Superior's Option; or retractus feudalis.*

THE superior, upon the application of an adjudger for sums of money, to be entered, has an option either to receive him, on payment of the composition, or to undertake the debt adjudged for, to the value of the lands, whereupon the creditor is bound to convey the same to him ^a. This privilege falls to be discussed here, tho' I have touched a little upon it elsewhere ^b. The superior's making an election to take right to the adjudication, is a favour done the debtor, who, upon redemption, is thereby freed of the composition, which otherwise must have been paid by the adjudger for his entry, and refunded to him by the debtor. This privilege is termed *Retractus feudalis* ^c; because it is a remedy competent to the superior to retract, or get back the lands to himself, if he is not willing to submit to a change of his vassal. But this cannot obtain in adjudications of the fee in implement, since the adjudication carries the property, in terms of the disposition, or obligation to dispoise the lands, of which the superior cannot deprive the disposee. This is an indirect way of compelling the superior to change his vassal, which, in adjudications for sums of money, the foresaid option was intended to prevent. But there was no hardship in this upon the superior, since he may be forced to receive an assignee to the original charter before infestment; and now, by the late act, he is bound to receive the disposee, without the circuit of an adjudication ^d, as above.

89. In what case may the superior, by the retractus feudalis, accept of the adjudger's right, and undertake the debt, and to what extent.

^a P. 1469.
^c 30.
^b B. 2. tit.
3. § 11.

^c Dirlt. (adjudications)
et ibid. Stew-
art.

^d 20 Geo. II.

I TOOK notice, in the above quoted place, of a decision of the court of session, whereby the superior was found obliged to receive a corporation adjudger for a debt, or to take right to the debt, on payment to the creditor ^e; and that, in virtue of the late act ^f, superiors were bound to receive all dispokees without distinction, whether they were corporations or not, upon tender of one year's rent as a composition. But now, as I am informed for certain, that the above judgment was reversed on an appeal, the case well merits farther consideration; for it would seem, that, if a superior is not bound to receive a corporation, where he has an option to take right to the debt and diligence, and thereby avoid the change of his vassal, he can much less be compelled to enter a corporation upon a disposition of the absolute property, where he has no such option, and by which he would, in effect, lose his superiority; as in the case of a blench holding. And since, by the law, a superior cannot prejudice his vassal, by interposing any other between himself and the vassal, or splitting the superiority, the vassal ought not to have it in his power, by his debts or deeds, to hurt the superior. And if our law stood thus before the aforesaid late act, it was not the intendment of that statute to alter it in that respect, the plain design of it being only to facilitate the entry of heirs and singular successors in lands, who had a title to be received. Wherefore the words of the act, "Any person who shall purchase or acquire lands and heritages in Scotland, &c." must be understood of natural persons, and not of bodies politic, who are Persons only by the operation of the law. And it was the opinion of our greatest lawyers, in former times, that superiors were not bound to receive corporations, unless some remedy was provided for saving to them the casualties ^g.

90. Whether a superior is bound to receive a corporation in place of his former vassal.

^e July 24.
1713. univ.
of Glasgow.
^f 20 Geo. II.

^g Craig lib. 1.
dieg. 15. § 16.
Stair, lib. 2.
tit. 3. § 41.

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91. The origin of this privilege; the *retractus gentilius* antiently in use with us.

It has been already observed, that, before the act 1469, introducing appraisings, the law was, that, failing the debtor's moveables, to be distrained or poulded for payment of his debts, the sheriff was to sell his lands at the suit of the creditor, and the price to be applied for payment of the debt and expences, and, if the lands held of the king, the sheriff was to give the buyer seisin thereof; but if they were holden of a subject, the superior might take them at the king's price, *i. e.* the price put on them by the sheriff as the king's officer. This statute did not introduce judicial sales of a debtor's lands; for it was our common law, or the Consuetude of the realm, as the act shews^a. But this was the first law that gave the superior a preference in the purchase of his vassal's lands, when he was necessitated to sell them for payment of his debt. This was formerly the privilege of the debtor's nearest kinsman, according to the borow law^b. Wherefore the *Retraetus gentilius*, that takes place in divers countries^c, was in use with us of old; tho' at present, and I presume ever since this statute, it has not been regarded in our law and custom. It was however the express law of the Jews^d, was countenanced in the civil law^e, and established by the feudal law of the Lombards^f.

^a Stat. Alex. II. c. 24.

^b Leg. burg. c. 95, 96, et 115.

^c Tyreag. de retroc. gentl.

^d Leviticus xxv. Ruth iv.

^e L. 16. ff. de reb. aut jud. poss.

^f 5. Feud. tit. 13.

92. Reversion to the debtor, introduced by the act 1469, not formerly competent.

By the statute 1469, the same power of selling the debtor's lands by the sheriff is continued; but, in case no buyer appeared, the sheriff was to chuse an inquest of 13 persons to value and apprise lands to the extent of the debt, and to make over the same to the creditor for his payment. And the superior is bound to receive the buyer or creditor, on payment of one year's rent for an entry; or otherwise accept of a right from the creditor, and undertake the debt. And a Reversion is granted to the debtor, *viz.* a liberty to redeem the lands from the buyer, creditor, or superior, in seven years, which, by the former law, was not competent; and this reversion was afterwards enlarged to 10 years, as it now stands.

93. What if there are several adjudgers of the same estate,

In the case of more adjudications, within year and day of the first effectual one, the superior, using this privilege, must take right to the whole; for all the adjudgers have a joint interest in the estate, and any of them may bring the same to a roup if it is bankrupt. And the case is the same, if one, tho' without year and day, has adjudged the reversion; for he may redeem from the superior, in the same manner as from the first adjudger.

94. Or if the land is not worth the debt.

If the lands are not worth the debt the same are valued, and the superior must take them at the proved value, and the creditor's right is reserved against the debtor for the residue: and the lands are redeemable from the superior, for what he paid to the creditor^g. This privilege is founded in the civil law^h.

^g June 21. 1671. Scot. July 24. 1713. university of Glasgow.

^h L. fin. c. de jure emphyt.

ⁱ Decem. 3. 1672. Hay.

95. Whether can the superior use this privilege after the legal is expired.

WHEN the adjudger applies for an entry, the superior has this option; but as adjudgers may possess during the legal, without being entredⁱ, it may be doubted, if, on the adjudger's insisting for an entry after expiration of the legal, the superior may take the benefit of having the lands to himself, on payment of the debt. For answer, he may seem rather more intitled to it, after the adjudication is expired,

ed than before ; because then it is certain that a new vassal must be obtruded; whereas, when the legal is current, the debtor, by redeeming, may come into his own place : and since this privilege was competent, before giving a reversion to the debtor, it may be thought not to alter the superior's case, whether it is expired or not ; and that the acts, limiting the legal reversion, concern only the debtor, to whom it is indifferent whether the superior or creditor have the lands irredeemably. But it hath been always supposed, that the superior was excluded as well as the debtor, after the legal is expired^a ; for the legal reversion, introduced by statute, must regulate the case as to all parties concerned. Wherefore, if the benefit of the reversion is not used in due time, either by the debtor, who, no doubt, is preferable to the superior, and may redeem from him; or by the superior ; it is gone forever, and the adjudger may hold the lands thereafter as his own property, by an absolute and irredeemable right.

^a Arg. March 5. 1634. Black.

SECTION VII. *Adjudications on debita fundi*.

THE statute, which brings in apprisings *pari passu*, that are within year and day of the first effectual one, excepts such as are led for *debita fundi*, as bygone annualrents, due on an infeftment of annualrent, ground annuals, feu-duties, and the like real debts, for which the ground may be affected, by a pointing of the ground, and declares these preferable, as before the act. Wherefore adjudications, on decrees of pointing the ground, for bygone *debita fundi*, proceed without any constitution of the debt against the heir^b, in the same manner as the decree for pointing the ground, which is said to be debtor in those, and the heritor is only called for his interest, but not decreed against. However, he must be sifted as principal defender in the adjudication, and decree taken against him, as such, therein: such adjudication is preferable, according to the rights whereupon the *debita fundi* are due:

^b Jan. 29. 1635. Moncrief.

96. The peculiarities in adjudications for debita fundi, or real debts, and the manner in which the same proceed.

THE legal, in apprisings of this kind, was prorogued by the act 1661, as well as of other apprisings ; for that clause of the statute is general, that the legal reversions of all apprisings shall be 10 years. And consequently this must take place in adjudications for *debita fundi*, such having come in place of apprisings for the same ; tho' my lord Stair is of opinion, that apprisings may still be led for such, and that, in those, the old legal of seven years still continues^c.

^c Lib. 4. tit. 24. p. 612.

97. The legal, in those adjudications, is ten years.

WHERE the principal and bygone annualrents and penalty, contained in an infeftment of annualrent, are adjudged for on the personal obligation in the bond, the creditor may pass from his adjudication as to the principal sum and annualrents, and take himself to his infeftment of annualrent, so far as concerns the same^d, as I have observed more fully elsewhere^e. But if the right is not only for an annualrent out of the lands, but likewise of the lands themselves, in security of principal sum, interest and penalty (as rights are ordinarily conceived by our present custom) then the creditor is preferable for the whole expences, as well as principal and annualrents. In such case all the use his adjudication serves for, is, to make the accumulate sum

^d Decem. 22. 1671. Campbell.
^e B. 2. tit. 5. § 11, 12.

98. The effect of an adjudication upon the personal obligation contained in the heritable bond.

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bear interest, for which additional interest he will be ranked upon his adjudication with the other adjudgers on personal debts.

99. How far adjudications for debita fundi, founded in the act 1672.

ADJUDICATIONS for *debita fundi* may not seem founded in the act 1672; because it provides, "That a progress of lands, equal to the debt, may be produced;" whereas, in those, the whole lands, affected with the real burthen, may of course be adjudged; since the creditor cannot be obliged to restrict his security, and no other lands can fall under it. But since apprisings are taken away by that act, the necessity of the thing required, that, in place of apprisings for real debts, adjudications before the lords of session, parallel to them, should proceed. For tho' the proviso, touching special adjudications, is proper only to such as are led upon personal obligations, yet the intendment of the act is general, and applies to all apprisings.

100. The foundation of adjudications for debita fundi.

DECREES of pointing the ground award letters to be granted for pointing the goods on the ground, and may likewise ordain the ground right and property of the lands to be adjudged, as the use was formerly to decree it to be apprifed. Wherefore since the precise sum resting is liquidated by such decree, it must be a good foundation for a separate adjudication, without any reference to the personal obligation by the debtor: and if he is dead, there needs no charge against his representative to enter heir, or a decree of constitution against him, in order to such adjudication; for still it is a real action, executorial only against the ground, in the same manner as the other branch, decreeing letters for pointing the moveables on the ground, was in order to an apprifing. I have discoursed farther upon such adjudications, in treating of infestments of annualrent^a.

^a B. 2. tit. 5; § 11, &c.

101. An adjudication necessary to creditors, with whose debts a disposition of lands is burthened.

WHERE dispositions of lands are burthened with a sum payable to the granter of the right, or a third person, a decree, for pointing the ground, is not competent to the creditor in such burthening sum. But an adjudication is necessary, that he may get possession, or otherwise operate his payment by an expired legal. In all those adjudications the debtor or his heir must be called as principal defender, and if he was denuded, the heritor of the lands, affected with the real burthen at the time of such action.

SECTION VIII. *Decrees of Roup and Sale.*

102. A decree of sale, an adjudication; what are its peculiarities and effects.

THE last kind of adjudications is, when the debtor's land estate is brought to a sale, by public roup, before the court of session, and the same is adjudged by them to the purchaser. This adjudication is without any reversion to the debtor, even tho' a reversion was current to him against the interests ranked on his estate, the law having expressly cut off the same; because, otherwise, probably there would be no purchaser^b. The purchaser being received by the superior, the decree of sale, with infestment thereon, gives an absolute right of property to him, upon payment of the price, in the terms of his bond, and caution granted for the same. If the party, who is preferred to the purchase, fail in finding caution in due time, which must be done at farthest before extract of the decree of sale, the court, upon application from the creditors, will authorise the decree of sale to go out

^b P. 1681.
c. 17.
P. 1690.
c. 20.

out in favour of the next immediate bidder, provided he be willing to give the price offered by himself, and regularly find caution for the same.

THE superior is expressly, by the statute, intitled to an year's rent from the purchaser, as an entry for receiving him, as in the case of other adjudgers. But, from the nature of the thing, he has not the privilege of *Retractus feudal*, viz. in place of entering the purchaser, to take a right to the decree, on payment of the price; for the absolute property belongs to the purchaser, without reversion to the debtor, as just said.

103. The case of a purchaser at a judicial roup, as to his entry with the superior.

THE intent of a judicial sale of one's estate is, that his creditors may get payment of their debts out of the price; but, in order thereto, they must have adjudged the lands, or be real creditors thereon; for otherwise no part of the price, that comes in place of the lands, can belong to them. And, by the statute introducing such sale, the roup preceded the ranking; but that inconveniency was remedied by the regulations 1695. Wherefore now the ranking must be concluded, and a decree thereon extracted, before the lands can be exposed to roup: and sometimes personal creditors are ranked in the last place, after all the real creditors, upon condition always, that before they draw of the price, they adjudge the estate. This expedient is founded in the nature of the thing, and tends to the purchaser's security.

104. A decree of ranking must precede the sale; the creditors must adjudge, to intitle them to draw of the price.

FOR the expedition of justice, in ranking of creditors upon bankrupt estates, and in order to save expence, by multiplicity of adjudications, it is provided by act of federunt, that, within 40 days after the sequestration of such estates, the creditors may give in to the process their grounds of debt, and require the factor to lead an adjudication of the estate in his own name, for their behoof: which he accordingly is bound to do, and the expence is to be allowed him in his accounts, and thereafter to be charged upon the several creditors, for whose benefit it was led, according to the proportions they shall draw of the price. And as to the creditors that do not give in their bonds within the foresaid period, or, at least, before raising the summons, the factor, at their desire, shall likewise adjudge for their behoof, but upon their own expence^a.

105. Factors, on sequestrated estates, bound to adjudge for the behoof of the creditors.

^a Act of fed. Nov. 23. 1711. § 2.

DECREES of ranking and sale being obtained, the price for which the purchaser grants bond, with sufficient cautioners, is payable to the creditors, as they are ranked: and, for the purchaser's further security, the creditors must, on payment, transmit to him their rights with absolute warrandice, so far as concerns the shares of the price received by them respectively. If he cannot safely pay, after year and day of the decree, he may consign the price, or remains thereof, in the hands of the magistrates of Edinburgh, and their treasurer, who are only liable for three *per Cent.* and, on such consignation, he is declared free of the price^b. This decree of sale, and payment of the price, in consequence thereof, as above, secures the purchaser against the debts and deeds of the common debtor; or of those whom he represents, without exception of minority; but will not, against the rights of third parties, which do not depend on them.

106. What incumbent on the creditors, upon receiving their share of the price; the purchaser's security, upon payment or consignation of the price.

^b P. 1695. c. 6.

Those

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Those who are prejudiced by the decree of ranking, have only action against the receivers of the price, pursuant to such decree, and not against the purchaser, or these deriving right from him.

107. Upon payment of the price, the purchaser gets up his bond.

THE purchaser must pay the price conform to his bond: and, after he has paid the price, in terms of the decree of ranking, or consigned the same, he will, on summary application to the lords of session, get up the security he granted for the price.

108. The rights and diligences of the creditors subsist till they get payment.

NOTWITHSTANDING the purchaser grants security for the price, as above, yet the rights and diligences of the creditors affecting the estate subsist, till the price is paid to them, as they are ranked. Wherefore, tho' the purchaser should obtain himself infest on the decree of sale, and burthen the lands with incumbrances, yet the creditors of the bankrupt are still preferable to all such deeds; it being a quality of the purchaser's right, that he shall make payment of the price according to the decree of ranking.

109. What if the estate is sold by parcels, and purchased by divers persons.

IN the sale of a great estate, it is sometimes advisable, that it be exposed to roup by parcels, which the court appoints, on proper application from the creditors. In this case the respective purchasers are intitled to the decrees of ranking and sale, so far as their purchases go. Subsequent to both the decree of ranking, and that of the sale, there is an act of division of the price, by authority of the court, making a distribution of the price among the several creditors, conform to the decree of ranking, which, in this case of divers purchasers, must ascertain the proportions payable by each purchaser, who is intitled to a conveyance corresponding to the sums he pays.

110. A judicial sale at the instance of an apparent heir, or of an heir served upon inventory.

THO', in the case of a bankrupt estate, the ranking preceeds the sale; yet a sale, at the instance of the apparent heir, on the act 1695, is expedited before the ranking; because the statute makes no provision to the contrary: as likewise does a sale at the instance of an heir served upon inventory, founded upon the same act, tho' not expressly enjoined by it, but is necessarily implied, in order that such heir may be exonerated. The expediency, for dispatch in the sale, sufficiently recommends such procedure.

111. The apparent heir intitled to the price without any service.

Where the estate is sold at a roup, in an action at the instance of an apparent heir, in terms of the above statute, if the price exceeds the debts and expences of the suit, the overplus must belong to the apparent heir, without any service: for, as he has by the law a title to bring the estate to a roup, he must likewise be capable to receive the whole, or residue of the price, the statute supplying a service and entry; and, if it were otherwise, the intent of the act would be frustrated, which is to save the apparent heir from involving himself in a passive title.

112. If adjudications are led, after the sale, within year and day of the first

IN both these actions of sale, the pursuer, whether apparent heir, or heir upon inventory, is only, in a manner, as trustee for the creditors of the ancestor, viz. to operate their payment by a judicial sale of the estate. And therefore, if some of the creditors have led adjudications

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dications before the sale, and others after it, but within year and day of the first effectual one, they are all brought in equally, and *pari passu*, as in the common case; tho' it may be thought, that those last having adjudged from the heir, after he was divested by the decree of sale, could thereby carry nothing. But, in the judgment of law, the heir, as the common trustee, is understood to remain still in the same state, in order to intitle the adjudgers, within year and day, to the benefit provided to them by the statute 1672^a. Thus, likewise personal creditors are ranked, *ultimo loco*, upon a bankrupt estate, with a proviso, that they shall adjudge the same before they draw any share of the price. Which may be done as well after the judicial roup and sale of the estate, at which time there is really no estate in the common debtor, as before the sale; for, by a fiction of law, the common debtor is holden as still vested therein, to support such adjudications.

effectual one, which was led before, they come in *pari passu* with it.

^a Jan. 29.
1748. Irvine.

Observations on the Law of England, in relation to the Premises.

VOLUNTARY conveyances of lands, or securities upon them, are, by dispositions and charters from the proprietors, and seifins thereon, and may, by our law, be granted either to be holden of the granter, which we call a Base-holding, or to be holden of the granter's superior, and we call it a Public-holding. These holdings of the granter of the right, and not of the superior, create great inconveniency; and they must be more frequent now, that ward-tenure is taken away, there being no danger of recognition or forfeiture of the fee, in case of alienating more than the half. But, by our antient law, no man could alien lands to be holden of himself, but the same behoved to be holden of his superior^a, which is the law of England at this day. At the common law the tenant might have made a feoffment of parcel of his tenandry to hold of himself, and his heirs: and, by an article in the great charter^b, he could alien so much only, as there should always be reserved sufficient for himself, and his heirs, to enable them to perform the services due to their lord. The tenant might likewise, by the common law, have aliened the whole tenandry to be holden of the lord, but could not a parcel of it, to be so holden, for thereby the Seignior would have been divided, and then the lord could not have liberty to distrain for the whole seignior, in every part thereof. The case was altered by the statute of Edward I^c. which upholds and preserves tenures, whereby lands were holden. This statute allows tenants to alien part of their lands, and ordains, that the purchaser shall hold the same immediately of the lord, by the same manner of holding, and for the same duties and services, to which the tenant, who made the alienation, was liable; and the king is bound by this act, as well as common persons. The only exception from this rule is, That the statute^d, *De donis conditionalibus*, secures feestail, which must be holden of the donor, to whom the reversion of the same belongs, on failure of the issue in tail.

1. How far the tenant could of old, or can at present alien parcel of his tenancy; the lands conveyed must be holden of the lord.

^a Stat. 2.
Rob. I. c. 24.
§ 2.

^b Cap. 32.

^c 18. Edw. I.
Quia emptores terrarum.

^d Westm. 2.
13 Edw. I.

CONVEYANCES of estates in lands, are either feoffments, by livery of seisin, whereof I have fully treated elsewhere^e: as likewise, I have

^e B. 2. tit. 3.
observ. § 20.
&c.

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discourfed

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discourfed a little of bargain and fale duly enrolled, in another place^a; but fhall add what farther occurs. ^aB. 1. tit. 19. obf. § 4, &c.

2. What if, in bargain and fale, 'tis covenanted, that the bargainor fhall make fuch title as the vendee's council fhall approve of.

WHERE an inheritance paffes by bargain and fale, divers queftions frequently occur touching the title of the bargainor, the incumbrances on the fubject, or at whofe peril it fhall be, in cafe of the fubject's perifhing cafually before an actual conveyance, fome of which I fhall touch upon. Thus, there may be a covenant, "to make fuch a title as the vendee's council fhall approve of." But this means no more, than that a good title fhall be made out: for, if his council fhall difapprove of a clear good title, (fuch as a court of law or equity would take to be a good title) yet the vendee fhall be bound by the bargain^b.

^b Vin. (vend. and vendee) p. 541.

3. If the vendee becomes bankrupt before payment of the price, it is a charge on the lands.

AGAIN, if a man fells land to one who becomes bankrupt, before the purchafe-money is paid, and againft whom a commiffion of bankrupt is iflued, the vendor fhall not be bound to come in as a creditor under the ftatute; but the land fhall ftand charged with the price, tho' there was no fpecial agreement to that purpofe^c.

^c Ibid. p. 543.

4. If incumbrances upon the lands appear before payment of the price, the purchafer may retain till they are difcharged.

A PURCHASER, *bona fide*, may lawfully buy in any incumbrances affecting the lands; and, if he can defend himfelf thereby at law, his adverfary fhall not be aided in a court of equity, to have fuch incumbrances fet afide. And where one fells land, and covenants to difcharge it of certain particular incumbrances; but before payment of the purchafe-money, other incumbrances appear, the vendee may retain it till all the incumbrances are difcharged^d. Our law, in the main, agrees with the premifes.

^d Vin. (purchafer) p. 173.

5. How far a purchafer is bound to fhew the title-deeds of the lands.

A PURCHASER is not bound to difcover the deeds that may make out another's title to the lands, nor to fhew the title-deeds to the heir, tho' he may be compelled to fhew him the deed by which he purchafed^e. There are, by our law, remedies to oblige all poffeffors of lands, to fhew the titles whereupon they poffefs; at leaft, fo far as to bar the purfuer's intereft, but no farther: *viz.* a reduction and improbation at the fuit of any perfon ftanding infeft in the lands; and an exhibition, *ad deliberandum*, at the inftance of an apparent heir.

^e Ibid. p. 115.

6. If the lands are fubject to a trust; how far is the purchafer concerned with the fame, or with the application of the price.

WHERE an eftate, fubject to a trust, is purchafed from the trustees for a valuable confideration, without notice given him of fuch trust, he is fafe, and a court of equity cannot interpoze to affect him: but only the trustees who are anfwerable to the truftee and his heirs; it is otherwife, if he had notice of the trust^f. Where a deed of trust is for payment of debts in general, a purchafer is not affected with any mifapplication of the money; but, if it is for payment of debts particularly fpecified, he is bound to fee the price accordingly applied^g.

^f Ibid. 119.

^g Ibid. 122.

OUR records fecure a purchafer in both cafes; for he is not barred by any trust, or other incumbrance, that he cannot from thence difcover; nor is he concerned as to the application of the price: unlefs, by the nature of the trust-deed, as it appears in the record, the purchafer

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chafer is tied down thereto ; which seldom or never is the case, for such proviso would discourage all purchasers.

^a Vin. (venditor and vendee) p. 543.

If a man buys a house, which happens to be casually burned before the time agreed for payment of the price, he will not, by a court of equity in England, be compelled to pay for the same^a. I humbly conceive that, by our law, such purchaser would be liable for payment of the price, provided he got the conveyance duly executed ; for then it became his property, and every thing must perish to the owner. It would be otherwise if there was only a minute of sale, or articles of covenant touching a conveyance of the same ; for then, since the subject which had perished could not be conveyed, the price would not be due. And this likewise seems to be the law of England, in a similar case : thus, if one, by articles, covenants to convey his title to a church-lease for two lives, by such a day ; but, after the articles, and before the time for the conveyance, one of the lives drops, the loss must be borne by the purchaser. But it would be otherwise, if both had dropt ; for the money being to be paid for the conveyance, and no estate being left, there could be no conveyance, and consequently no place for a demand of the price^b.

^b Ibid. 545.

^c 6 Annæ, c. 35. 7 Annæ, c. 20.

In the counties of York and Middlesex, the registering deeds, conveyances and wills is appointed, and they are declared to have priority only as they are registred^c. A case happened, that a second purchaser of lands, in one of those counties, had notice of the first purchase ; but, finding that it was not registred, went on and purchased the same estate, and got his purchase registred ; it was decreed in chancery, that, he having notice of the first purchase, it bound him, tho' the same was not registred ; and that his getting his own first registred was a fraud, the design of such statutes being only to give parties notice, who might otherwise, without such registry, be in danger of being imposed upon by a prior purchase or incumbrance, of which they are in no danger, when they have notice thereof in any other manner^d. I doubt not but the same rule would hold with us ; for the party who makes the second purchase is, in such case, partaker of the fraud in granting double rights.

^d Vin. (registering acts) p. 282.

^e Coke 1. inst. 38.

FINES and recoveries are introduced by the law of England, to secure mens titles to their estates. A Fine of lands is a Conveyance or Feoffment of record ; so called, because it puts an end to the controversies touching the same : it has the form of a composition of a real controversy^e. Generally it is a feigned action upon a covenant, to secure one's title to his estate. It is a composition or concord, acknowledged and recorded before a competent judge, touching lands or tenements in controversy, or supposed to be in controversy between the parties to the same concord. It cuts off entails, and secures the title that one has in his possession, not only presently, on levying the fine, against the parties, and privies thereto, viz. themselves and their heirs ; but likewise against all others not expressly excepted, after the expiration of five years from the four proclamations had, pursuant to the statutes in that behalf^f. Women covert, infants, prisoners, and persons out of the realm when the fine was acknowledged, are not concluded by it.

^f 31 Eliz. Cha. II. &c.

7. What if the subject sold perish before the time of payment of the price.

8. If a second purchaser having notice of the first purchase, but that it was not registred, obtain his deed to be first registred, the first purchaser will be preferred notwithstanding.

9. A fine, why so called ; it is a conveyance or feoffment of record ; it cuts off tails and incumbrances.

A FINE

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10. The five essential parts of a fine.

A FINE has five essential parts : 1. The original writ taken out against the connusor. 2. The king's licence, giving the parties liberty to accord. 3. The concord itself, which is by way of indenture between the connusor and connusee, whereby the connusor acknowledges the right of the connusee, &c. It is usual to have a deed of covenant to pass a fine of such lands by a day certain ; then a writ of covenant is brought by the connusee against the connusor, who thereupon yields to pass the fine before a judge, and this acknowledgment being recorded, the connusor and his heirs are presently concluded, and, after five years from the proclamations, all others. 4. The Note of the fine. 5. The Foot of the fine, which contains the date, and before what Justice of the common pleas it was made ^a.

^a Coke 5. rep. 38. 4 H. VII. c. 24. 32 Hen. VIII. c. 36.

11. A common recovery; the procedure in it; this is a feigned recovery, by a fiction of law.

A COMMON Recovery is likewise used in England, for securing the purchasers of lands against all incumbrances, by destroying estates-tail, remainders and reversions affecting the same. A true recovery is where any thing or its value is recovered in judgment ; but this is a feigned recovery, and what the civilians call a Fiction of the law. It is a certain form or course, prescribed by law, for the better assuring lands and tenements to the purchasers of the same. Three persons are required in it ; the Demandant or Recoveror, the Tenant or Recoveree, and the Vouchee. The procedure is thus: the person who would cut off an estate-tail causes a writ of entry to be brought for the lands ; and, in a feigned count or declaration, the demandant, in that writ, pretends he was disseised : to this the tenant, who is usually created by a conveyance made for that purpose, appears, and vouches the tenant in tail, who appears and vouches over a servant of the court for warranty, as common vouchee (who is worth nothing) and he pleads, and after makes default ; whereupon the land is recovered by the demandant, and judgment is given, that he shall recover, and have a writ of seisin for the possession of the land demanded, and that the tenant shall recover the value of the land against the tenant in tail, who shall recover in value against the common vouchee. This value is feigned to be a satisfaction to the heir in tail, tho' he is never to have or expect it. The above is the procedure in a Common Recovery with a double voucher, and is the most common and safe way. In that with a single voucher, the writ is brought against the tenant in tail himself, who vouches the common vouchee. It is called a Common Recovery, because it is a beaten and common course to bar the estates above-specified ^b.

^b Coke 1. inst. 372. 10. rep. 31.

12. The effect of a common recovery is to cut off all incumbrances, remainders and reversions, as well as entails.

THE effect of a common recovery is to cut off all incumbrances ; so that one thereafter may sell, give, or bequeath the land as he pleases. The supposed recompence is the reason why a common recovery is a bar to all that are in the remainder or reversion, as well as the heirs in tail : whereas a fine only bars the heirs in tail, but not those in remainder or reversion, unless upon non-claim in due time. The supposed recompence adjudged over shall go in succession, as the land lost should have done ; and it would not be reasonable to allow the heir, &c. the land and the recompence. A tenant in tail cannot be restrained by condition, from suffering a common recovery. This is the best assurance (except an act of parliament) that purchasers can have for their lands ^c.

^c Coke 1. inst. 124. 10. rep. 38.

A TENANT

A TENANT for years, or tenant by statute merchant or staple, or by elegit, may falsify a common recovery had against him in the reversion, and enjoy his term or other tenancy against the recoveror ^a. It may likewise be falsified and avoided by writ of error, when there is some gross error in the proceedings in matter of substance ^b.

13. A tenant for years, by statute or elegit, may falsify a recovery had against him in the reversion.

^a 21 Hen. VIII. c. 15.

^b Coke 1. inst. 104.

WE have no such forms as fines and common recoveries, for securing one's title to his estate; but our records may prevent any danger to purchasers of lands: for, unless the incumbrances are found registred in the proper record, they are not to be regarded by purchasers or creditors. A proprietor of lands may likewise insist in a reduction and improbation, against all persons he suspects to have any incumbrances upon them. And if the same are not produced, they are cut off, by a decree of certification, as false and forged; and one may safely purchase the lands thereafter, without regarding such pretended incumbrances.

A CONVEYANCE may likewise be made, by a covenant, to stand seised to uses, viz. where a man, by covenant and writing under his hand and seal, agrees that he and his heirs shall stand seised of lands, to the use of his wife, children, brother, or other person, in fee-simple, fee-tail, or for life ^c. Natural love and affection is a good consideration to raise and support uses for provision of one's wife or near relations; but a covenant to stand seised to the use of a stranger must be for money, or other valuable consideration ^d.

14. A conveyance by covenant to stand seised to uses; natural affection supports it in near relations.

^c Coke 1. inst. 112.

^d Coke 1. rep. 176. 2. rep. 15.

THIS manner of conveyance is grounded upon the statute of Henry VIII. ^e which conveys the estate of the land, as the use was directed. It declares, "That where any person is seised of any lands, &c. to the use or trust of any other, by reason of any bargain and sale, feoffment, fine, recovery, or otherwise by any means whatsoever, *Cestuy que use*, or he to whose use the lands are settled in fee-simple, fee-tail, for life, years, or otherwise, or he who hath any use in reversion or remainder, &c. shall be esteemed to be in possession of the lands, to all intents and purposes."

15. This conveyance grounded on the statute of Hen. VIII. which unites the possession to the use.

^e 27 Hen. VIII. c. 10.

ONE that had the use before this statute had no more at common law but a trust, or an equity to have the lands, and had no remedy but a suit in chancery upon breach of trust ^f: but now this statute, which unites the possession to the use, executes the agreement as the chancery would have done before, and gives the lands to those that had interest in the use. The case is the same where, in the *habendum* of the deed of feoffment, it is declared to whose use it is made; and then the person and his heirs, for whose use the party, by covenant or *habendum* of the deed, stands seised in virtue of the statute, have the possession without livery and seisin ^g.

16. Before the statute, the party, for whose behoof the use was created, had only a suit in chancery to make it good; but now the statute executes the trust.

^f Coke 1. rep. 87, 10. rep. 12.

^g Coke 1. rep. 126, 136.

By our law, if it appeared, from the seisin upon the deed, or declaration of trust in the record of reversions, that the infestment was for the behoof of another, the trustee could not falsify his trust. But otherwise a latent declaration, upon a writing apart, would not operate in prejudice of a *bona fide* purchaser of the lands from the trustee; for he purchases on the faith of the records.

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17. Feoffments, without a valuable consideration, intended in trust for the grantor.

IF lands be granted to one by deed, and no consideration is expressed; or it bears only in general for divers good Considerations, it shall be intended, by the law of England, in trust for the grantor. Or, if a man make a feoffment in fee, without a valuable consideration to divers uses, so much as he has not destinated to such uses is in himself; but, if the feoffor reserve 1 *d.* rent, or receive from the feoffee 1 *d.* of consideration, the feoffee shall be seized to the use of himself and his heirs^a. Our law would hold such feoffment good, tho' no rent were reserved, or consideration given; for a trust could not be inferred otherwise than by the grantee's oath or writing, in terms of the act 1696, so that it would be holden a gift.

^a Coke 1. rep. 16.

18. Estates by statute merchant or staple, or by elegit, can never become absolute rights of property.

By our law, apprisings of old were, and now adjudications introduced in their place, are judicial conveyances of lands, after expiration of the legal reversion, which is 10 years after their date. But there is no method, by the law of England, whereby estates by statute merchant, staple, or elegit, or by a writ of extent, can become absolute rights of property; for fines and common recoveries may bar them, but no length of time can avail to render them absolute freeholds and inheritances.

19. Conveyance of lands likewise is by release, viz. by the lessor's releasing all the right he has to the lessee for life, and to his heirs; or where the disseisor releases his right to the disseisor and his heirs.

LANDS may, by the law of England, be conveyed by release. Thus, if there is a lessee for life, the lessor who has the reversion, by releasing all the right that he hath in the lands and tenements leased, to the lessee and his heirs, conveys the freehold to the lessee, who already is in possession by livery and seisin^b, a lease for life not being otherwise constituted than by livery and seisin, as I have related elsewhere^c. As in feoffments there is required the word (Heirs) to distinguish the feude from such estates as are not hereditary, so it must be inserted in such releases that come in place of feoffments, where the possession was transferred before. Nothing passes by the release to the lessee who is in possession, but by way of enlargement of the estate of the lessee; for it does not operate to give a new estate of the reversion, but to increase the estate in possession. Wherefore it works not by Merger of the first interest, which is part of the interest that the lessee now has in him by the release^d. A freehold, in like manner, passes by release to the disseisor, where the disseisor releases to him and his heirs all right he the disseisor has in the lands and tenements, the disseisor being already seized therein.

^b Coke 1. inst. Littl. sect. 445, &c.

^c B. 2. tit. 9. obf.

^d Vin. (release) p. 298, &c.

20. A right of ownership, a right of possession, and a right of both ownership and possession.

FOR the better understanding the conveyance of naked rights to lands and tenements by release, I must observe from my lord Coke^e, That there is *jus proprietatis*, a right of ownership; *jus possessionis*, a right of seisin or possession; and *jus proprietatis et possessionis*, a right both of ownership and possession. Thus, one seized in fee of lands or tenements, and in possession, hath *jus proprietatis et possessionis*; but, if he makes a lease for life, or is disseised, the lessee or disseisor hath *jus possessionis*, and the lessor or disseisor hath *jus proprietatis* only. Again, if the lessor or disseisor release all his right to the lessee or disseisor, they come to have both *jus proprietatis et possessionis*.

^e Coke 1. inst. 266.

21. In the case of conveyance by

IN the case of a lease for years, the lessee's actual entry is equivalent to the acceptance of livery for passing of a freehold, by the lessor's

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for's release to him and his heirs; but, in the case of a conveyance by a lease for one year, and release by the lessor to the lessee, there needs no previous entry of the lessee before the release, for the lands may lie at a distance. This conveyance grew in time the most common and easy method of conveying a freehold, and so has continued for a long time, almost to the disparagement of livery^a.

^a Coke ibid.

INHERITANCES therefore pass by lease and release, as above, whether the lease be for life or for years, or even for one year, as for most part is the case of a conveyance in that manner. And likewise, if the release be made "Of all right, title or claim the debtor has in the lands" to tenant, by statute staple or merchant, or tenant by elegit, the inheritance passes, and this enureth by way of enlargement of the estate. And, if the release be made to such lessee, or other foresaid tenant, and his heirs, then he hath a fee-simple; and if to him, and the heirs of his body, he hath a fee-tail. Thus, it behoves to specify in the deed, what estate he to whom the release is made shall have; for, if the release is simple in favour of the person, without mention of His heirs, he has only thereby an estate for life, there not being sufficient words in law to create an inheritance^b.

^b Littl. sect. 465. et ibid. Coke.

WHERE the disseisee releases to the disseisor, and his heirs, the case is the same; for the release puts the right of the disseisee to the disseisor's estate; which, tho' wrongful before, is by the release made lawful^c.

^c Littl. sect. 466.

RELEASES likewise enure by way of extinguishment, viz. if he, to whom it is made, cannot have or enjoy the thing released: as, where the lord releases to the tenant the seignior, the tenant cannot have service to be taken of himself, and by this the whole seignior is extinct, without any words of inheritance. The like is in a release of a rent-charge, or of a common of pasture: for a man cannot have land, and a rent, or common of pasture issuing out of the same. In all those, and the like cases, he to whom the release is made cannot have and enjoy the thing released, and therefore it enures by way of extinguishment^d.

^d Littl. sect. 479. 480.

By our law, no such enlargements of estates, or extinguishment, can take place; for one, after granting a lease of his lands, whether for life or years, and the lessee's possession thereupon, is as much proprietor of the same as before; and therefore his property or inheritance cannot pass without his deed of conveyance, and seisin thereon, or legal diligence divesting him of the same. As likewise, the lord or superior is deemed, in our law, to have an inheritance in the lands, and must be infeft therein; and consequently he cannot be divested of it, otherwise than as in the case of the full property; and consequently the same cannot be extinguished by a release to the vassal, who can only thereby be relieved of the duties or services.

LANDS and tenements pass by livery and seisin; but things incorporeal, as reversions, advowsons, rents, commons, &c. are said to lie in grant and not in livery; because they cannot pass from one to another without deed. Grants by an infant, regularly, are void; but, if he enters into an obligation sealed, makes a feoffment, levies a fine,

lease for one year, and release, the lessee needs not enter before the release.

22. A release likewise by the debtor to the tenant, by statute merchant or staple, or by elegit, operates a conveyance of the inheritance. The release must specify the estate which the releasee is to have.

23. A release to the disseisor, and his heirs, a conveyance.

24. Releases likewise enure by way of extinguishment, as where the lord releases the seignior to the tenant.

25. Things incorporeal lie in grant; how far grants by an infant or feme covert good.

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a fine, or suffers a common recovery, these are not purely void, but voidable only. A grant by a feme-covert is void, for no act of her's can transfer the interest which the intermarriage has vested in the husband; and therefore a rent-charge granted by a wife, without the knowledge and assent of the husband, is void^a.

^a Bac. new
abr. (grants)
648.

26. How far grants by an idiot, or a person of insane memory, voidable by him or his representatives.

By the strict notions of the common law, the grants of idiots, and persons of insane memory, are good as to themselves; because none can disable himself. But his heir, executor or administrator, may avoid them, by pleading the insanity. But neither he, nor his representatives, can vacate any act of his done in a court of record; for he must be presumed, at that time, capable of contracting; and therefore the credit of the record is not to be contested^b.

^b Bac. ibid.
649.

27. Several particulars, which cannot be conveyed or assigned over.

THE law will not suffer a possibility, a right of entry, or thing in action, a cause of suit, or a title for a condition broken, to be granted or assigned over; but, in equity, a bond is assignable for a valuable consideration paid^c, as was observed in the preceeding title.

^c Bac. ibid.
661.

28. In a bargain and sale of lands, a covenant for a way, how far good.

If one bargains and sells land to one, and his heirs, with a way over other of his lands, this is void as to the way; for nothing but an use passes by the deed; and there can be no use of a thing not in *esse*, which is the case of a way, before it is created^d.

^d Bac. ibid.
662.

29. Grants most strongly construed against the grantor.

GRANTS are to be construed according to the intention of the party; and, if there appear any doubt or repugnancy in the words, such construction is to be made as is most strong against the grantor; because he is presumed to have received a valuable consideration. Thus, if a man, by deed, grant a rent-charge of any thing that lies in grant, without mentioning any particular estate, the grantee has an estate for the term of his own life; because a man's act is taken most strongly against himself; and the grant being made to one, it cannot be supposed out of him, as long as the same person continues^e.

^e Bac. ibid.
670.

30. Things pass as appurtenant to the principal thing; what things may be appurtenant or appurtenant to other things.

SEVERAL things pass as appendant or appurtenant to the principal thing granted, without express mention of them; as, if a man grant a manour, to which an advowson is appendant, it passes without even saying, *Cum pertinentiis*; so of a common, &c. But a thing corporeal cannot be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. And nothing can be appendant or appurtenant, unless it agree in quality and nature to the thing to which it is appendant or appurtenant: thus, a common of estovers, cannot be appendant or appurtenant to lands, but to a house to be spent therein it may^f.

^f Littl. sect.
184. et ibid.
Coke.

T I T. III.

Confiscations or Forfeitures. Bastardy, and last Heir.

1. Confiscations, what, and how distinguished; what confiscations are

I HAVE hitherto treated of the ways of transmission of personal and real rights, moveable or heritable, among private persons. I shall now speak of their transmission from private persons to the sovereign, by his prerogative, which is termed Confiscation or Forfeiture.

^a Tit. ff. de
jure fisci.
^b Cap. 13.
ext. de præ-
script.

^c B. 2. tit. 4.
sect. 4.

^d B. 1. tit. 8.
§ 2, &c.

feiture. We have the term Confiscation, from (*Fiscus*) in the civil law^a; but that of Forfeiture from (*foris-facta*) in the canon law^b: both import fines or penalties, or other things that go to the use of the public. But Forfeiture is a more general term, as being applicable to one's forfeiting his life; whereas Confiscation is particular to such as forfeit only to the king's exchequer. It is either of moveables, and is specially called Single Escheat; or of the profits of one's lands during his life, and is termed Liferent Escheat; or of all one's effects, heritable and moveable, as in high treason, bastardy, and last heir; of those I shall treat particularly. I have already discusst that of life-rent-escheat, in its proper place, amongst the casualties of superiority^c, of which it is one; and therefore I shall touch but little upon it here. Of wreck and waif goods, and treasure found, I have likewise spoken already^d. here treated of.

SECTION I. *Single Escheat, Outlawry.*

ESCHEAT, from an old French word, signifies Caduciary. Single Escheat, is "the falling of one's whole moveables to the king, or those "in his right." It falls, in some cases, as the punishment of certain crimes; but, most ordinarily, upon one's being denounced, for not obeying a charge of horning, or for not compearing to answer in a criminal prosecution before the justiciary. Horning (so termed from three blasts of a horn, used in executing it, at the market cross) is "a writ or letters in the king's name, commanding one to pay or perform something within a time limited, under pain of rebellion," as Outlawry is termed in our law. It proceeds either on a summary decree of registration, or other decree obtained against the party. The execution of this writ, or letters of horning, against the party, is called the Charge, and the publication of it at the market-cross, the Denunciation. This must be done by three Oyeses calling the people to hearken, over-reading the letters, three blasts of a horn, and leaving a copy of the letters affixed to the market-cross; all which must be specially exprest in the execution.

2. Single escheat, how, and on what denunciations does it fall.

THE import of the denunciation is, that because the party, duly charged in the king's name, did not obey the charge, therefore, conform to the will of the letters, he is denounced, and declared rebel; and thereby formerly, even in all civil cases, as well as criminal, his moveable goods escheated to the king. This denunciation cannot be used till the days of the charge are expired; which, in hornings upon ordinary decrees, is 15 days, and likewise on decrees of registration, where the clause of registration bears, *In form as effeirs, i.e.* according to the course of law; but otherwise, in the terms to which the debtor consents in the clause; which, for most part, is To letters of horning on six days, and this is the term limited in those upon protested bills of exchange, by the act 1681. As the law abhors negligence, the denunciation must proceed within year and day of the charge, otherwise it is void. Nor can it be used after suspension, tho' the same was not intimated^e; because, a surcease of diligence being granted in the king's name, the party cannot incur any forfeiture or disability, from what follows in contravention thereof. A denunciation for a criminal cause proceeds upon the party's not appearing in court, to

3. The import and effect of a denunciation; how the same must be proceeded in.

^e Spotisw.
(hornings)
p. 149.

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undergo his trial on the day mentioned in the criminal letters, or not finding caution for that end ^a.

^a Nov. 29.
1671. Hague.

4. Upon what denunciation for civil causes did escheat formerly fall; escheat in such case now taken away, but the other effects of it still remain.

It was not every denunciation for a civil cause that made the escheat to fall, but only that which was served at the head burgh of the shire, stewartry, bailiary or regality where the debtor resided, and duly registred, within 15 days, in the sheriff-court books, or of other judge ordinary foresaid ^b, or in the general register of hornings, &c. at Edinburgh. And, by a late act ^c, escheat upon denunciations for civil causes was entirely abolished after 25th March 1748. But still a horning, with a regular denunciation in all civil cases, in the same manner as in criminal, has the effect to disable the party from appearing in judgment, and makes the sum charged for bear interest from the date of the denunciation.

^b P. 1579.
^c 75, &c.
^c 20 Geo. II.
^c 5c.

5. If the party lives out of the kingdom, how must he be charged and denounced.

WHEN the debtor lives out of the kingdom, he must be charged upon 60 days, at the market cross of Edinburgh, pier and shore of Leith, and denounced likewise at these places ^d, and the denunciation must be registred, within 15 days, in the general register at Edinburgh. The escheat is said to fall by the denunciation, as the stile of it bears, but that is only on condition that it be duly registred; and, in default of such registration, it is held not to have fallen, the denunciation thereby becoming void.

^d Nov. 27.
1747. Ramsay.

6. Denunciation at the market-cross of Edinburgh, how far good.

It has prevailed by custom to denounce persons upon hornings, for civil causes, at the market-cross of Edinburgh, tho' they live not within the liberties of that city, or within the shire; but such denunciations serve only for warranting captions thereon, and have no other effect. The speedy and easy execution of personal diligence hath given occasion to such usage.

7. Denunciations for criminal causes, or for debts to the crown, how proceeded in.

DENUNCIATION upon acts or decrees of the justiciary, declaring persons fugitives from the law, for not appearing, when cited in a criminal process before that court, or for not finding caution for that effect, may be at the market-cross of Edinburgh, and in circuits, of the borow where the court sits, by special statute ^e, and registred in the books of adjournal ^f. As likewise may charges and denunciations of persons liable to count in exchequer, and which must be registred in their books, or in the sheriff-court books of Edinburgh ^g. By such denunciation, in criminal matters, the offender's single escheat falls to the king; and, if he remain under it for year and day, his life-rent-escheat falls to the respective superiors of his land.

^e P. 1584.
^c 140.
^f P. 1593.
^c 128.
^g P. 1587.
^c 63.

8. The effect of denunciation, or outlawry, for treason.

IN England, upon outlawry in treason, the offender forfeits as much as if he had appeared, and judgment had been given against him, so long as the outlawry is in force ^h: such outlawry, in cases of treason, which are regulated by the law of England, must take place with us ⁱ.

^h Coke 3.
inst. p. 52.
232.
ⁱ 7 Annæ,
^c 19.
^k 7 Annæ,
^c 20.

9. The difficulty as to outlawing one for treason, or misprision of treason, in

THE British statute ^k, which enacts, "That all crimes and offences, which are high treason, or misprision of high treason within England, shall be adjudged, and taken to be high treason, or misprision of high treason within Scotland; and that the persons convicted or attainted thereof shall be liable to the same corruption
" of

^a Art. 19.

" of blood, pains, penalties and forfeitures, as persons convicted or " attainted of the same in England," no doubt subjects those who should be indicted of such crimes, when not in custody, to be outlawed, if they did not appear, and surrender themselves to justice; and to the same consequences of such outlawry as persons attainted in that manner in England are liable to. But the difficulty was, that the court of justiciary in Scotland, where such indictments might be carried on, being exempted, by the treaty of union, from all dependence upon the courts of Westminster-hall ^a, the writs issuing out of those courts, in order to an outlawry, could have no course here; and indeed, by their stile and tenor, they concern only England. And, by our forms, a defender, in a criminal prosecution, not appearing, could only be denounced and declared fugitive from the law, the consequence of which is only the party's single escheat, and, after year and day, his liferent, as above.

Scotland, by the statute of queen Anne.

^b 22 Geo. II. c. 48.

IN order to remove all such difficulties and doubts, the late statute ^b introduced a remedy to have persons who are indicted of high treason, or misprision of high treason in Scotland, and do not appear, outlawed, viz. that writs, of the like kind with these in England, should be issued out of the courts in Scotland wherein such indictment is found, and executed, indorsed and returned to the same court. Thus, a writ of *capias*, in the king's name, shall be issued out of such court, directed to the sheriff or steward of the county where the indictment is found, returnable 42 days at least after the test thereof, commanding him to take the defendant and bring him before the court whence the writ did issue, at the time and place mentioned in the writ; and if the defendant shall be named in the indictment, as of any parish or place, lying in any county other than that in which the indictment is found, then the court shall issue another *capias* to the sheriff or steward of such other county, to the same effect.

10. The procedure in order to outlawry, in cases of treason, or misprision of treason, by the late statute.

IF the sheriff or steward shall return to such writs, that the defendant cannot be found within their counties, then the court shall issue two other writs, the one a writ of Proclamation, the other a writ of Exigent, tested the day of the return of the writ or writs of *capias*, directed to the sheriff or steward of the county, and returnable in one and the same future day. By the writ of proclamation, the sheriff or steward is commanded to take the defendant and bring him before the court, at a certain time and place, to be mentioned in the writ; and if he cannot be found within such county, then to cause public proclamation to be made in the court of the sheriff or steward-depute of such county; and likewise at the quarter-sessions of the peace, and at the door of the church of the parish, or place of which the defendant shall be named or described in such indictment, between the hours of ten of the clock in the morning and two of the afternoon; that the defendant appear before the court from whence the writ did issue, at the time and place therein-mentioned: which proclamation shall be made three several times, and the third proclamation shall be made 28 days at least before the fifth and last sheriff or steward-depute's court, at which the defendant is to be called, by virtue of the writ of exigent.

11. The writ of proclamation, how served.

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12. The writ of exigent, and judgment of outlawry, and consequences thereof.

By the writ of exigent, the sheriff or steward shall be commanded to cause the defendant to be called to appear at each of five successive courts, to be holden by the sheriff or steward-depute of the said county. And if the defendant shall not appear and surrender himself, so as to be forthcoming to justice at one or other of the said courts, at which he is so proclaimed or called, the sheriff or steward-depute shall, at the last of the said courts, pronounce judgment of outlawry against him, and sign such judgment, and return the same, and the writs of proclamation and exigent, into the court from whence the same did issue, together with indorsements on each, certifying that the said sheriff or steward has done every thing required of him by the said writs, and that the defendant did not appear (if that shall be the case.) And thereupon the defendant shall be deemed to be attainted of such high treason as is mentioned in the indictment; and subject and liable to such execution and corruption of blood, pains, penalties and forfeitures, and processses, with respect to his estate personal and real, moveable and immoveable, to which persons attainted of high treason by law are subject and liable. And a defendant, so outlawed for misprision of high treason, shall be subject and liable to all such forfeitures and processses, as persons outlawed for misprision of high treason in England are liable and subject to.

13. Defendants have the same remedies as to setting aside outlawry as in England.

DEFENDANTS outlawed for high treason, or misprision of high treason in Scotland, shall, in virtue of the statute, have, as near as can be, all such and the like writs, means, methods, remedies, and advantages, for avoiding, falsifying or reversing any such outlawry, as may be had by the law and usage in England in the like cases, (excepting so far as the forms of proceeding are varied and settled by this act.) And all the writs before-mentioned, with the returns thereof, and judgments of outlawry, shall be recorded and preserved in the courts to which such writs shall be returned, unless removed by due course of law.

14. The sheriff, or steward, shall cause five stated courts, to be held in order to execute the exigent.

By the same act the sheriffs or stewards, to whom the respective writs of proclamation and exigent shall be directed and delivered, shall forthwith appoint five successive courts of the sheriff or steward-depute, to be held for the purposes above-mentioned, three days notice being first given before the first court, at the head-borow of the shire or stewartry, of the times and places where such courts shall be held; and the first of these courts, at which the defendant is to be called by virtue of the writ of exigent, shall be held within 20 days after delivery thereof, to the sheriff or steward, and each of the other four successive courts shall be held at the end of four weeks from the court preceeding.

15. Persons out of the kingdom may traverse the outlawry within an year after it is pronounced.

THE same act provides, " That if any person, so to be outlawed
" for high treason, shall, at the time of such outlawry pronounced,
" be resiant or inhabitant out of the limits of the kingdom of Great
" Britain, and, within one year after such outlawry pronounced, yield
" himself to the justice-general, justice-clerk, or any of the commis-
" sioners of justiciary in Scotland, he shall be at liberty to traverse the
" indictment on which such outlawry was pronounced, and take his
" trial thereupon. And in case, on such trial, he shall be found not
" guilty,

" guilty, by verdict of the jury, he shall be clearly acquitted and discharged of such outlawry, in the same manner as if no such outlawry had been made."

A WRIT of Exigent, in virtue whereof the sheriff proclaims and calls the defendant five county days to appear, is so termed; because it exacts and requires the defendant to appear and answer the law, upon pain of outlawry; for if he come not at the last day's proclamation, he is said to be *quinquies exactus*, and then is outlawed. And it lies likewise in England, where the defendant, in an action personal, cannot be found, nor has any effects within the county, whereby he may be attached or distrained ^a.

16. The nature of a writ of exigent.

^a Cowel, law interp. (exigent.)

THE single escheat likewise falls by our law and custom; in divers instances, otherwise than upon denunciations: thus, as above hinted, the punishment of certain crimes is the escheat of moveables, by express statutes, viz. perjury, breach of arrestment, deforcement, and invasion of ministers of the gospel: in this last, and deforcement, the half of the escheat goods is adjudged to the party injured ^b.

17. The single escheat falls on other occasions than a denunciation.

^b P. 1551.
c. 19.
P. 1592.
c. 152.
P. 1581.
c. 118.
P. 1583.
c. 27.

AGAIN, the single escheat falls in consequence of a capital sentence, tho' nothing relating to it is therein express; for the rule with us, and many other countries, is, " That one who forfeits his life, forfeits his goods likewise;" and to that purpose, as well as others, the common maxim, *Mobilia sequuntur personam*, is applicable. In other cases than treason or misprision of treason; he forfeits no more than his moveables. The case, by the civil law of old, was, that one condemned in a capital crime forfeited his whole estate, personal and real; but if he had children at the time of the sentence, the one half was reserved to them ^c.

18. It falls on a capital sentence; but if the criminal escape, and make acquisitions, what shall become of these.

^c L. I. ff. de bonis damnat.

IF a criminal, condemned to a capital punishment, is reprieved, or, by escape, lives some time after sentence, and thereafter dies without a remission, what shall become of the intermediate rents of his estate, or other acquisitions, between the date of the sentence and his death? The case is plain as to one attainted of high treason; for whatever lands he has at the time, or shall thereafter acquire, are forfeited to the king; since, tho' he is capable to acquire lands, yet he cannot hold them, because of the corruption of blood, but they must go to the crown ^d. And as to other crimes it may seem likewise, that one under sentence of death cannot purchase to himself, but to the fisc, and that the time of his death is to be conjoined to the date of the sentence: that the confiscation looks back to the time of the criminal fact, and looks forward to the time of the offender's death, who dies under condemnation. Such condemned person is, by the sentence, civilly dead, and therefore a horning at his instance is void ^e. But, in the case supposed, it would seem, that only the condemned person's moveables, and he being civilly dead, the life-rent of his heritage, (after year and day of the sentence) either belonging to him at the time of condemnation, or accruing to him thereafter, could fall under confiscation. But that the fee of his lands, tho' the rights of the same supervened to him after sentence, descends to his heir, since the sentence could not affect the same; unless

^d Coke 1. inst. 2.

^e Newt. decif. 27.

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less we suppose that, by such sentence, one becomes *servus pœnæ*, disabled to hold rights. This indeed is laid down as a rule for determining the question, from the civil law, by the learned Craig^a; but slavery of all kinds being taken away with us, the sentence can infer no such disability. The case would vary if the heritable subjects were purchased by the criminal, with the moveable effects, or product of the same, that belonged to him at the time of the capital sentence; for, as to such subjects, they being furrogated in place of the moveables that belonged to the fisk, justice would require that, in a declarator, they should be found to go the same way.

^a L. 1. dieg.
12. § 37.

19. One's proper effects only fall under his escheat, not those he has for behoof of others.

ONE, by his civil rebellion, confiscates only his own proper interest. And therefore an executor, even after sentence, whereby the testament is executed, becoming rebel, his escheat could only carry what was proper to himself of the executory not uplifted or consumed; and not the share of the wife, children, or nearest of kin, which could only be confiscated by their own rebellion^b. And the executor, who was likewise nearest of kin, could not, by his rebellion, forfeit the executory, in prejudice of the legatees or creditors of the deceased; for his interest in the executory is only after satisfying those.

^b Decem. 21.
1671. Gordon.

20. Single escheat belonged formerly to lords of regalities, now abolished.

SINGLE Escheat regularly falls to the king, in the right of the prerogative; but lords of regality, by the erection of their lands into that dignity, had right, from the crown, to the escheats of all persons living within their jurisdiction, and which, by special statute, they were intitled to^c. Their right took place, tho' the moveables belonging to such rebels were locally without the bounds of the regality^d. So that the moveables, wherever situated, did follow the person of the owner, and, in this respect, the maxim, *Mobilia sequuntur personam*, took place; but now that privilege ceases, all such jurisdictions being extinguished.

^c P. 1579.
c. 75.

^d June 26.
1680. Young.

21. The subjects that fall under single escheat.

SINGLE Escheat comprehends lying money, household furniture, corns, cattle, and all moveable goods, and all bygone annualrents and annuities, bonds of borrowed money not bearing interest at the time, unless they contain clauses of infestment. Even bonds secluding executors; or other sums of money not bearing interest, tho' substituted in place of heritable claims; as the price of lands not bearing interest, by the conception of the security, tho' by law it does; and, for the same reason, bills of exchange fall under the single escheat of the creditor^e. It likewise carries the bygone rents of lands, arrears of feu-duties, or other real debts out of them, and such as fall due within the year after the rebellion^f. The husband's *jus mariti* in the wife's moveables falls under the husband's single escheat: liferents assigned to the rebel debtor, and tacks of lands, other than liferent-tacks, are carried by it^g. All such particulars, accruing to him during his life, while unrelaxed, fall under the single escheat; except such as are carried by the liferent escheat, as rents of lands, after year and day of the rebellion, &c.

^e Feb. 4.
1663. Philorth. June 26. 1668. Dick. Hume decis. 55.
^f July 1.
1626. Halyburton.
^g P. 1617.
c. 15.

22. The escheat burthened with the provisos.

BUT such subjects fall to the fisk, with the burthens wherewith they are affected; and therefore, a bond granted in consideration of certain provisos, in favour of the debtor or third party, will not be exigible

^a Decem. 13.
1672. lord
Lyon. Nov.
23. 1677.
Cunningham.
Jan. 15.
1679. Cran-
stane.
^b Nov. 25.
1675. Chal-
mers.

exigible by the donatary to his escheat, till those are performed^a; nor will money paid, or goods delivered by the rebel, in a fair way of bargain, or discharges granted by him upon real payment, be subject to challenge; but goods pointed, after declarator of escheat, tho' for debts prior to the rebellion, may be recovered by the donatary^b. Moveable bonds, bearing interest, do not fall under single escheat, if the rebellion happened after the term of payment of the principal sum, bearing interest thereafter; for, tho' bonds in such case are moveable by the act 1661, as to their falling to executors, yet, by the same act, they are still holden as heritable, with respect to the fisk; and no heritable rights, other than those above-mentioned, fall under single escheat.

ons affecting
the subjects
of it. The
case of move-
able bonds.

^c P. 1579.
c. 75.

^d P. 1567.
c. 25. June
26. 1680.
Young.
^e Nov. 20.
1628. Wef-
ton.

THE king may take the benefit of such escheats to his own use; and of old, the escheat-goods were punctually to be gathered in by the treasurer^c; but at present, escheats are granted by the barons of exchequer in the right of the crown, as they see expedient, to persons applying for them. The grant is termed a Gift, and the receiver, donatary, because the king gets no valuable consideration for it. The gift of an escheat that "shall fall" is void, tho' the escheat should fall on the horning mentioned in the gift^d, being like the grant of an office before a vacancy. It is likewise void, when it does not mention the particular horning whereon it proceeds, being presumed surreptitious^e. Lords of regality either took the benefit of the escheat themselves, or assigned it to another, as they saw cause; and their grants were good to bar their own interest, tho' labouring under such defects; because they were presumed to advert to the terms of the same: but, in competition with third parties upon the escheat-goods, the most complete right must have been preferred. This observation can only be of use as to escheats that had fallen in their hands, before the abolition of those jurisdictions by the late statute^f.

23. Gifts of
escheat, in
what cases
null.

^g P. 1592.
c. 147.

^h Feb. 22.
1672. trea-
surer-depute.
Hume decif.
46.

THE escheat of itself gives no right of property in the goods, or a complete right to other subjects falling under it; but there must be a General declarator of the escheat before it is understood to be effectual, and which may proceed after the party's death, upon calling his nearest of kin. A Special declarator is only a petitory action for the subjects falling under escheat, which may be done in any other proper suit, or in the general declarator, by a conclusion for that purpose. Persons of old sometimes got gratuitous rights, for their own behoof, to such escheats, out of favour to themselves, and then they granted no backbond, and were not accountable either to the king or creditors of the rebel. This exercise of the prerogative was justly complained of, and prohibited by statute^g, being not only highly prejudicial to the debtor, but likewise to his lawful creditors. Most frequently gifts of escheat are granted to creditors, for security of their debts, and pursuant to the statute just referred to. They are liable to grant backbond, declaring, that after satisfying their own debts, and others mentioned therein, they shall be accountable for the overplus. Donataries are not bound to diligence, and are only liable for their actual intromissions, unless they are interpellated by the creditors in the backbond, or second donataries^h.

24. Gifts of
escheat, how
prosecuted;
to what di-
ligence the
donatary is
liable.

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25. Escheats falling in civil cases, always formerly burthened with the debt in the horning, but now justly abolished.

THE donatary was liable for the debt in the horning, whereon the escheat fell, the escheat being expressly burthened with that debt^a; and, if he once intermeddled with any part of the escheat-goods, he could not thereafter free himself of the debt, by renouncing the gift^b. All intromitters with the escheat-goods were declared liable to the debt in the horning, as well as donataries; and consequently, lords or baillies of regalities, that took the benefit of the escheat, behoved to answer for that debt. This was most reasonable, since it was for not satisfying the debt that the denunciation proceeded, whereby the escheat fell. But now, by the late act^c, escheats for civil causes being abolished, they cannot subsist, even in behalf of the creditors, at whose suit the party is denounced. This may seem an hardship, viz. to impair the diligence of lawful creditors for security of their debt; but such effect of the diligence was, notwithstanding, justly set aside, since by it the whole moveable subjects of the debtor, and even the liferent of his lands were affected to the creditor who used it, which frequently turned to the ruin of other creditors, who were not so hasty or rigorous. Wherefore the law at present is more equal; for all the creditors may, by poindings, arrestments and adjudications, affect the estate, personal or real, of their debtor: and none of them, by such exorbitant mean of execution as the single and liferent escheat, can take advantage of the rest. But escheats that fell before the act took place still subsist, which may be gifted, or otherwise prosecuted; and escheats still remaining as to criminal cases, competition of gifts, in that respect, may occur.

^a P. 1592.
C. 145.

^b March 15.
1631. Fletcher.

^c 20 Geo. II.

26. The rule of preference among donataries to escheats.

THE first gift is always preferable, if none of the donataries have done diligence by declarator; but otherwise, he that obtains the first decree of declarator is preferable, for that perfects the escheat, which, tho' not gifted, requires declarator. Second gifts need no declarator, the right of escheat being already perfected by declarator in the person of the first donatary. If the horning or denunciation, whereon the first gift proceeded; labours under any defect, the second gift is preferable thereto, and in that case must be declared^d.

^d Decem. 6.
1662. Stewart.

27. When is a gift of escheat presumed simulate.

IF the gift of escheat be taken for behoof of the party unrelaxed, it is called Simulate, and thereby void, as fictitious^e. It is presumed simulate, if the rebel, his wife, or children in family with him, remained in possession of the escheat-goods, with the donatary's knowledge, after such reasonable time as he might have dispossessed them; but, how long forbearance shall have that effect, is in the arbitrement of the court of session^f.

^e P. 1592.
C. 147.

^f Dirlt. decis.
14. D. 411.
March 28.
1637. Hamilton.
Jan. 6.
1666. Oliphant.
June 19. 1669.
Scot.

28. The escheat may be directly gifted for the use of the wife or children, without being chargeable with simulation.

BUT sometimes the gift is destinated for the aliment of the party's wife and family; as where circumstances of commiseration or favour occur, the husband being an extravagant person, and altogether negligent of his family; or where the wife, perhaps, had a liferent by a former husband, to secure which, or part of it, for the wife's maintenance, the gift is granted. If the gift is expressly given for the wife's aliment, and the donatary's backbond conceived accordingly, it will be effectual to secure it to her, exclusive of the husband's *jus mariti*, and in prejudice of his creditors; for the crown might gratuitously give it to a stranger. Wherefore the allegation, that the gift

gift is simulate, cannot take place in this case; that being only understood, where a tacit trust is undertaken for the rebel, under colour of a gift of his escheat, to the prejudice of his creditors, without the intention of the granter.

It is likewise a presumptive ground of simulation of a gift of escheat, if it was expedited upon the rebel's expences, or procured by him^a. But where the donatary is a lawful creditor, and granted backbond to the exchequer, this ground of simulation, last mentioned, will not cut off his right, which, in that case, could only be taken away by his own oath, "that it really was for the rebel's benefit^b."

^a Decem. 17. 1670. Langton.

^b Decem. 12. 1673. Dickson.

29. What if the gift was expedited on the debtor's expences.

THE objection of simulation is not only competent to the creditor, at whose suit the debtor was denounced, but to all the creditors, being a nullity of the gift, and any other person, taking out a second gift, will be preferred; because truly the escheat is, in judgment of law, still undisposed, notwithstanding the first gift, against which the objection of simulation lies^c.

30. To whom is the objection of simulation competent.

^c D. P. 1592. c. 147. et dd. decis.

AFTER the party is relaxed from the horn, he may take the gift of escheat directly to himself, which, in that case, needs no declarator. However, all the effect it can have, is to denude the crown, or others to whom the escheat belongs, and thereby exclude second donataries. But it cannot be available against lawful creditors, for the escheat becomes extinct *confusione*; and it were absurd, that any right in the debtor's person should exclude his creditors.

31. The effect of a gift of escheat taken to the debtor himself.

THE gift of the single escheat is presumed to comprehend no more than the moveables the rebel then had, or should acquire within year and day of the gift. But, if the words of the gift are express, comprehending "all that should belong to the party, till he is relaxed," rights falling to him at any time, while he is unrelaxed, will be carried thereby, because all those fell under the single escheat^d: but otherwise it will be understood with the foresaid limitation, as to future acquisitions^e.

32. What falls under the gift of single escheat.

^d Feb. 3. 1712. lord Minto. July 2. 1669. Bowie.

^e Newt. decis. 76. id. Dec. 93.

^f P. 1592. c. 145. Dec. 13. 1672. lord Lyon.

THE escheat is burthened with all inherent conditions of the rights falling under the same, and especially with the debt in the horning, whereupon it fell in former times^f. And, because the declarator alone completes it, therefore creditors for debts, before the rebellion, (but not for these contracted after) getting payment, or assignation of any of the subjects falling under the escheat from the debtor, tho' granted after the denunciation, or even the gift, are preferable to the donatary; provided they recover payment, or innovate the debt assigned before declarator^g.

33. In what cases creditors preferable to the donatary.

^g Feb. 24. 1669. counsels of Dundee. July 9. 1669. Row. Feb. 9. 1675. Veitch. Dec. 19. 1676. Grant. Jan. 18. 1678. Purves.

BUT, if the denunciation is upon a criminal fact, for the offender's not appearing at the diet prefixed, to abide a legal trial, then the time of the commission of the crime, whereon it proceeds, is respected to a certain effect, for preventing of fraud. Hence, all voluntary gratuitous deeds, after the criminal fact, in prejudice of the fisk, must yield thereto, in the same manner as such deeds by a

34. How far has a denunciation for a criminal cause a retrospect.

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bankrupt must give way to his prior creditors, *Creditor etiam accipitur, cui ex delicto debetur*^a; on commission of a crime, the public is creditor to the offender for the punishment, and the party injured for his reparation. But to no other effect has the denunciation a retrospect to the committing of the crime, more than in civil cases, to the date of the bond whereon the horning proceeds; and, in all the statutes on this head, they are equiparated^b.

^a L. 12. ff. de verb. signif.

^b P. 1579. c. 75. P. 1584. c. 40. et 42.

35. The rule of preference between creditors and donataries to escheats.

THE rule therefore is, that creditors for debts lawfully contracted before the denunciation, whether for civil or criminal causes, getting payment either directly from the rebel, or upon assignation from him, or by poiding his goods before declarator, are secure against any challenge from the donatary^c; or from the lord of regality who took the benefit of the escheat to himself, for it required declarator as much as a gift from the crown. And tho' regalities, and heritable bailliaries, with their privileges, are extinguished by the foresaid late act, yet the escheats, and other benefits that accrued to those interested therein, before the statute was to take place, viz. 25th March 1748, do remain with them. An arrestment laid on for debts contracted before the rebellion, or denunciation, will be effectual, if there has followed a decree of forthcoming before declarator; and in that case the creditor is preferable to the donatary, tho' he had not recovered actual payment before declarator, in virtue of the decree. And likewise one's confirming, on such debts, executor-creditor before declarator, is preferable to the donatary^d.

^c Nov. 25. 1671. Chalmers.

^d Nov. 8. 1710. Borthwick.

36. How far debts or deeds, after commission of the crime, preferable to the fisk.

OF old, no debts contracted after the criminal fact, tho' before the citation in the prosecution of the crime, were prejudicial to the escheat that fell upon the criminal sentence^e. But, by our present law, onerous creditors, whose debts are contracted before indictment for crimes; tho' after commission of the offence, are preferable to the fisk, since in high treason, when it is latent, this was the case^f. And the forfeiture, in other lesser crimes, cannot have a stronger effect; and in these, even the criminal sentence, inferring the escheat, would seem to be the rule, as was just observed in the case of denunciation for a criminal cause. And fair bargains of sale with the rebel, or payment of debts to him before declarator, must be sustained in favour of commerce. And transmission of such rights, as do not fall under the escheat, are not subject to challenge, on account of the civil rebellion^g.

^e Stair hoc tit. § 16.

^f P. 1690. c. 33.

^g Spotswood (assignations) Cunningham.

37. The rule of preference between divers donataries to the same escheat.

IT hath been already observed, that, in competition between divers donataries to the same escheat, the first is preferable, where they are equal in diligence, with respect to a declarator; but the priority of the gift is considered, not according to the date of the gift's passing in exchequer, but of its passing the seals thereafter, it being the seals that complete it^h.

^h Decem. 6. 1662. Stewart.

38. A liferent assigned, falls under the assignee's single escheat, and may likewise be adjudged;

THE liferent of the wife, from her first husband, is carried by the *jus mariti* of the second, as her legal assignee, and falls under his single escheat, as does any liferent gifted or assigned under the assigneesⁱ; and it is likewise carried by an adjudication against the husband, or other assignee. In competition between the donatary and an

ⁱ March 10. 1631. Stewart. July 29. 1625. Ker.

^a July 18.
1668. lord
Dumfries.

an adjudger of a liferent assigned, the donatary is preferable; tho' the adjudger's debt was prior to the rebellion, and the adjudication before the donatary's gift, if the adjudication was led after the rebellion^a; for the rule, preferring the diligence of creditors, perfected before declarator, to the fisk, concerns moveables that can be carried by pointing or arrestment, and not such right as hath *tractum temporis*; which, when assigned, is instantly carried by the assignee's civil rebellion. And consequently the adjudication against the assignee, after his escheat had fallen, could not carry the liferent that belonged to the fisk by the rebellion.

how far the
donatary pre-
ferable to the
adjudger.

^b Feb. 22.
1672. trea-
surer-depute.

^c P. 1672.
c. 7.

ALL rights of escheats, or other confiscations, are granted by signatures or gifts from the crown, which may be stopt at their passing the seals, those being checks against subreption or obreption, *i. e.* their being obtained by concealing the truth, or expressing a falshood. Rights of such kind, as may be conveyed among private persons by assignations, pass the privy seal; those of lands and heritages, which, among subjects, are transmitted by dispositions, pass the seal kept for Scotland, in place of the great seal: this includes likewise the privy seal. Thus a gift of forfeiture, which comprehends not only lands, but likewise the moveables of the party may be in the same signature, and need only pass the great seal for both, if the moveables are expressly disposed and assigned in the gift. If a gift is surreptitiously past without the donatary's granting backbond to the exchequer, it is understood, notwithstanding, to be qualified with a backbond restricting it to payment of his own debt, and the expences of the gift, and that even in prejudice of his singular successor. Hence, a second donatary will be preferred to the overplus of the escheat-goods^b; but if the gift is granted to the donatary for his own merit, or upon special considerations, *gratis*, without back-bond, the objection cannot take place. All writings that pass those seals must be duly recorded^c.

39. Gifts of
escheat by
subreption
or obreption;
how do gifts
pass the seals.

^d P. 1594.
c. 213.

^e Fount. Feb.
20. 1698.
Gordon. Stair
Feb. 25.
1681. Gor-
don. Dalr.
Feb. 22.
1713. Clark.
^f P. 1579.
c. 75.

If the denunciation, or horning, labour under any informalities instantly verified, or if they proceeded after suspension of the debt, the objection will exclude the donatary by exception. But otherwise payment of the debt, before denunciation, can only be received in a reduction, to which the donatary, and officers of state for the king's interest, must be called, to prevent collusion between the creditor and debtor^d. It is a nullity of the horning if the denunciation does not bear three blasts of the horn, and three oyeses, and that a copy was affixt or left at the market-cross; and against persons out of the kingdom, one copy at the market-cross of Edinburgh, and another at the pier and shore of Leith^e; or if the charge has not all the solemnities of ordinary executions of summonses, for they are the same. The civil rebellion, or outlawry, is taken off by the party's relaxing himself from the horn: this relaxation must be by letters under the signet, published at the market-cross, and registred in the same manner as the denunciation^f; but it extends only to goods afterwards acquired: for such as belonged to him at the time of denunciation, and thereafter till relaxation, remain under escheat, and belong to the donatary. In criminal cases it is taken off by the party's surrendering himself, and submitting to a lawful trial.

40. How is
the single e-
schat ex-
cluded, or the
disability ta-
ken off.

BECAUSE,

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41. Civil rebellion divests one of persona standi in judicio, induces interest, and makes way for a caption.

BECAUSE, by the denunciation duly served and registred, one is declared rebel (as he is termed in our law) and outlawed, therefore, while he still remains at the horn, this civil rebellion debars him from standing in judgment; either as pursuer or defender, he has not *personam standi in judicio*; for, while he is disobedient to the laws, he cannot claim the benefit of the same. But if one at the horn is called in any suit, where his personal appearance is necessary, the lords of session will not hold him as confess, if the pursuer bars him by a registred horning; but, upon application, grant warrant to relax the party, in order to enable him to defend. The denunciation makes likewise sums to bear interest thereafter, as is already observed: and lastly, it makes way for a caption, whereof I shall discourse in its proper place^a. These effects of an horning, duly executed, remain still inviolate, notwithstanding that escheats, upon denunciations for civil causes, are taken away, as above.

^a Lib. 4. tit. (perf. dilig.)

42. How far was it lawful of old, or is at present, to injure one, under a civil rebellion, in his person or estate.

ON pretence of this civil rebellion, it is not lawful to commit any violence on the rebel's person, more than on the other lieges, by special statute^b. It provides, "That if any of the subjects be mutilated or slain, being at the horn for civil causes, the allegation, that the party was at the horn shall be no defence to the defender pursued for such crime before the justice-general, or his deputies, nor procure impunity to him." The statute is declared to have force and effect *For all such crimes only as shall be committed thereafter*: wherefore it is plain that, before this statute, one at the horn, or outlawed for a civil cause, might have been hurt or slain with impunity. This may seem harsh and unreasonable; but it was the consequence of the person's being denounced rebel; for thereby he was excluded from the protection of the law, without respect to the procuring cause of it. At the same time, our law was not so absurd as to put one in such state for non-payment of the debt charged for, which might not be in his power, but rather for not rendering his person to the king's prison, which he might easily do. This appears from the manner of executing charges upon letters of Four Forms (as they were called) then in use. On these, four several charges were given to the party, each at the distance of three days from the other: by the first, the debtor was charged to make payment; by the second, to do it, under the pain of rendering his person to the prison contained in the letters; by the third, that he should do the one or the other under pain of rebellion, and being put to the horn; this was renewed by the fourth: after all which, upon disobedience, he was denounced rebel, and put to the horn; wherefore it was for his not surrendering his person, (in default of payment) which was in his power, that he was denounced rebel. This was the form in the time of the above statute, but which was altered the very next year, and, in place of that course, letters of horning, upon a simple charge, were introduced by the court of session^c.

^b P. 1612. c. 3.

^c Spotswood, (hornings) p. 151. 152.

43. A parallel between our denunciation of persons to the horn, and the imperial ban.

THUS one incurred the Imperial Ban, not only for a breach of the public peace, but likewise for not obtemperating execution, upon a decree for payment of debt, or any other civil cause; and after a denunciation against him passed before the imperial court on such contempt, it was lawful to the creditor, or any other to kill him, or take his goods from

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^a Gail. de
pace publ.
lib. 1. c. 6.

from him at pleasure, as being excluded from the protection of the law ^a. Denunciation of persons to the horn, with us, was after the same manner with the denunciation to the ban of the empire, and had the like effect of old as to the liberty of injuring their persons; for, as to their moveables, they fell to the king, as at present. But the foresaid statute introduced a just temperament to that rigid ex-ecutorial process, in respect to their persons; and therefore, ever since, it was no less criminal to injure a person at the horn for civil causes, or in a civil rebellion, (as our law terms it) than to do the like to any other of the subjects.

The act does not concern those that are denounced for criminal causes; but it is certain, that, whatever was the course of old, every person now must be holden innocent till he is convicted and attainted. And, even in case of an attainder of one for a capital crime, it is not lawful for private persons to harm him in his person or goods, which are only at the disposal of the public. Nor can he be put to death, even by the officers of the law, otherwise than in terms of the sentence.

44. The case of one denounced for a criminal cause, as to the security of his person.

^b B. 2. tit. 4.
sect. 4.

^c 1 Geo. I.
c. 19.

If the rebel remains year and day at the horn, his liferent-escheat falls to his superior. This is improperly reckoned among confiscations, since it is generally a casualty of the superiority; and in that respect it falls to the king only when superior, in the same manner as to subject superiors, and not in virtue of the royal prerogative. I have treated largely of this casualty in another place ^b. But sometimes it is properly a confiscation, as where it is the penalty of certain crimes, as above. Thus likewise, for the public safety, in the time of the rebellion 1715, if persons, cited by letters from the lords of justiciary, did not appear at the day limited, and find caution, as directed by the statute ^c, they incurred the penalty of single and liferent-escheat to his majesty's use, besides other pains.

45. Liferent-escheat not ordinarily a confiscation, but sometimes is.

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SINGLE and liferent-escheats are of no inconsiderable moment, and the party subject thereto, is said to be "in a civil rebellion," a character not very consistent. But a forfeiture of all lands, heritages and moveables, as well as the pains of death and corruption of blood, are the just punishment of a criminal rebellion or high treason; that being the highest and most enormous crime, in a political consideration, as tending to the dissolution of the government. Forfeiture is a general term, comprehending all kinds of confiscations; but, when simply express in our law, it is meant of the punishment of high treason.

46. Forfeiture, simply express, is understood of the pains of high treason.

By the British statute, "such crimes or offences as are high treason, or misprision of high treason in England, and no other, shall be construed to be high treason, or misprision of high treason, within Scotland," and may be tried either before the court of justiciary, or by commission of oyer and terminer from the king; and all persons attainted and convicted of high treason, or misprision of high treason, in Scotland, shall be subject and liable to the same corruption of blood, pains, penalties and forfeitures, as persons

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47. High treason, and misprision of high treason, regulated with us by the law of England, pursuant to the statute 7 Annæ.

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" convicted and attainted of high treason, or misprision of high treason, in England ^a."

^a 7 Annæ,
c. 20.

48. How far can a trial for high treason proceed, after the lapse of three years, or the offender's death.

A TRIAL, in terms of the act of the 25 Edward III. made our law by this statute, cannot be carried on for treason after the death of the offender ^b, which was otherwise by our old law ^c. And indeed it is somewhat surprising, that, at the revolution, when the pains of treason were not a little moderated by the act 1690, that excessive severity of attainting persons after their death was not taken away. It is likewise no small benefit, by the law of England, that a trial of one for treason cannot proceed, in case he is not attainted; or at least an indictment found against him, by a grand jury, within three years of the commission of the fact; only the atrocious crime of designing, endeavouring or attempting any assassination on the body of the king, may be tried at any time, without limitation ^d. But one may be attainted of high treason after his death, by act of parliament.

^b Coke 3.
inst. p. 12.
^c P. 1540.
c. 69.

^d 7 Will. III.
c. 3. made
our law by
d. 7 Annæ,
c. 20.

49. The pains and forfeitures for high treason, and misprision of treason.

It is implied, in the judgment of high treason, that the delinquent shall forfeit to the king his lands and tenements whatsoever, and that from the time of the treason committed; and all his goods, and chattels or moveables, from the time of the conviction; and that his blood shall be corrupted, whereby he loses all his honours, and becomes base as to his birth, and his children cannot succeed to him, or any of his lineal ancestors. In misprision of high treason, which is "one's knowing of it, and not revealing the same to a judge or magistrate," the punishment is imprisonment for life, and forfeiture of the offender's goods and chattels, and profits of his lands, during life ^e.

^e Coke 1.
inst. 391,
392. 3. inst.
211, 218.

50. How is the forfeiture made effectual.

If the king takes the benefit of the forfeiture, then the exchequer, to whose jurisdiction the cognizance, touching all honours, tenements, and other rights belonging to the crown in virtue of any attainder, and the remedies for recovering the same, are annexed, may issue writs to the respective sheriffs, to take inquisition and survey the forfeited estates; and to assume possession of the same, without any previous declarator, that being necessary only to perfect a donatary's right to the forfeiture, in some cases after mentioned. But frequently, where the forfeitures are numerous, special statutes are enacted, either ascertaining their jurisdiction in that respect, or vesting other courts therewith, as shall be afterwards remarked.

51. How does the donatary to a forfeiture prosecute his right.

FOR the most part, before the union, forfeitures were in use to be gifted by the king to such persons as he pleased. And the donatary, if the forfeiture was by judgment of parliament, might without a decree of declarator; and, if before the justiciary, after declarator, obtain himself infeft, under the great seal, in lands holden of the crown: and when lands, or other heritable rights forfeited, held of subject superiors, the king, of old, was in use to grant presentation of the same in favour of such donatary. Upon such presentation, the superior was bound to receive the donatary as vassal in the lands, without any composition for an entry, by the same manner of holding as the forfeited person held the same ^f.

^f P. 1584.
c. 2.

BUT

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BUT, at present, the forfeited estates are sometimes vested in trustees, to be sold for payment of the debts duly claimed and sustained thereon, and the residue for the use of the public, as was done by statutes, in relation to the estates of persons attainted of high treason, on account of the rebellion 1715^a: or in the king, to be sold by the barons of exchequer, for his majesty's behoof, after payment of the debts; which was the case of the estates that were forfeited, as belonging to persons attainted of high treason for the rebellion 1745^b. In such case, the purchaser is infest by the subject-superior, and must pay a composition for his entry, as any other singular successor to the vassal. The king is deemed and adjudged in actual and real possession of the lands, and all other things of the offenders, attainted of high treason, by the attainder itself, without any office or inquisition to be found of the same, or any special vesting act^c.

^a 1 Geo. I. c. 20. 4 Geo. I. c. 6.

^b 20 Geo. II. c. 41.

^c 33 H. VIII. c. 20.

52. The vesting acts, in relation to the rebellions 1715, and 1745.

IT is observed by the learned Craig, That corruption of blood, upon an attainder of high treason, took place with us; so that if the son having issue was attainted, living his father, his issue could not succeed to their grandfather on their father's predecease: and he takes notice of a decision of the court of session to that purpose^d. And, indeed, the stile of remissions, granted by our kings of old, to persons attainted of high treason, plainly imports, that corruption of blood followed upon such attainder; for it "reposed the party, and "all his descendants, against the sentence, by which they were rendered incapable of enjoying lands, honours, offices, and goods "whatsoever;" as the same is given us by our stilist^e. Hence we may observe, that our kings could, by their pardon, restore the blood, which is otherwise at present.

^d Lib. 2. dieg. 18. § 24.

^e Dallas, p. 653.

53. Corruption of blood consequent, even by our old law, upon an attainder of high treason.

THE forfeiture comprehends not only heritable subjects, but all other things belonging to the rebel; and, when the same is gifted by the king, the donatary, after declaring his gift, (in cases where 'tis requisite) may insist for possession of the moveables, and recovery of the debts due to him; in the same manner as any other singular successor to him might, without being liable to his debts, farther than as after-mentioned. I conceive, that lawful creditors, perfecting their diligences before declarator, had, by our former law, the same preference to the donatary upon the moveable estate, as in the case of single estate, the nature of both being the same. But now, in cases of treason, it must be limited to diligences perfected before attainder, or outlawry, on account of such crime.

54. How does a donatary to a forfeiture make his right effectual.

IF a presumptive heir is attainted, the estate of the ancestor, still in life, cannot fall under his forfeiture; but, if he outlived the ancestor, and thereby the estate devolved on him, it would, by our former law, have fallen to the king, by his forfeiture, according to the opinion of eminent lawiers^f. But, I conceive, it was not by way of forfeiture, but founded on the maxim, *Quod nullius est cedit domino regi*. The forfeited person was entirely disabled to inherit, and no other could while he intervened; and therefore the estate descending on him behoved to fall to the king, as in the case of last heir, which still takes place, as hereafter remarked. But nothing hindered the predecessor to alien or dispoise his estate to another, and so exclude the

^f Dirlton (forfeiture) et ibid. Stewart.

55. The case of an estate descending to a presumptive heir, after his attainder. May the predecessor disappoint the forfeiture.

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the forfeiture of it, since one cannot incur any disability to convey his estate, by the attainder of his presumptive heir.

56. What if the father was under an obligation, in his contract of marriage, in favour of his son attainted.

BUT if the father was under a previous obligation, by his contract of marriage, providing his estate to such heir, it is doubted, how far, on his attainder, the father can, by a gratuitous settlement, defraud the fisk, since he could not bar the heir? On the other hand, as a father may, on rational considerations, disinherit such heir of provision, and settle his estate upon another son of the same marriage^a, it may be thought a justifiable reason, in such case, for the father to make a settlement, and thereby prevent the estate from falling to the crown, in the room of the person attainted; since he might have disinherited the heir himself, on account of such heinous crime, even tho' he had not been attainted.

^a Hume decis. 50.

57. What debts, deeds or rights, was the forfeited estate charged with by the law of Scotland.

THE forfeited estate was not, of old with us, affected with any debts or debts, to which the king had not consented, by confirming the same; or which the immediate superior had not confirmed, where a sub-vassal was forfeited^b. But, by the act 1690, creditors, vassals, and heirs of entail under strict irritancies, of persons forfeited, and likewise the husband's courtesy and the wife's terce were secured^c. This act, as to creditors, towards the beginning, bears this clause, "The debts being always upon record, by being registred, or diligencence done thereupon." This is brought very abruptly in, and is not repeated in the subsequent clause, where the case is fully set down. Nor is it consistent with the same; for, if it is sufficient that the debts be contracted and founded before the treason, which is all that the latter clause requires, then there is no necessity of their being upon record. Nor is it compatible with the exception in the same clause, *Of such debts as are contracted during the rebellion*; unless we shall suppose, that as there is no period of time mentioned, before which the debts shall be on record, it shall be sufficient, that this be done before citation in the process whereupon the forfeiture proceeds. However, this, and every other case touching forfeitures for high treason, must be governed by the law of England, and British statutes relating to forfeited estates in Scotland, and not by this act.

^b June 2. 1680. Blair. Newt. decis. 34. id. decis. 56. ^c P. 1690. c. 33.

58 Do faculties or powers to contract debts, or to revoke, fall under the party's forfeiture; the case by the law of Scotland formerly.

IT may be doubted, whether, if one disposes his land-estate, "reserving to himself a faculty or power to burthen the same with debts, either to a particular extent, or at pleasure, or a power totally to revoke the deed," such power or faculty falls under his forfeiture, if he shall be afterwards attainted of high treason; so that the king, or his grantee, might still exert the faculty, and thereby burthen or recover the estate. As to the law of Scotland, the lord Dirlton gives vacillent answers to the question he moves on this head. But Sir James Stewart is positive, that such faculty is carried by the forfeiture; for that 'tis a right in the forfeited person, and therefore must go to the crown by his attainder^d. Indeed he had a clearer rule to govern himself by, viz. the act 1690^e, upon which, however, he does not ground his opinion. That act determines in the case of the attainder of an heir of entail, under strict irritancies, that the next heir shall be thereby prejudiced, so far as the forfeited person had liberty to contract debt, or affect the lands and estate, by the quality of the right

^d Dirl. (reversion personal) et ibid. Stewart. art. ^e P. 1690. c. 33.

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right and infestment. Now, I cannot see any material difference between such faculty or power; and that reserved to a fiar, upon conveying his estate. And which determines the case, were it to be decided by our former law, that such faculty, whether it be ample and extensive over the whole estate, or limited to a certain extent or effect, would fall under the forfeiture of the person to whom it is competent. And it hath been found, that the benefit of such faculties may be adjudged by the party's creditors, and that even after his death^a.

^a Hume (faculty) Jan. 17. 1723. creditors of Rusco.

^b 33 H. VIII. c. 20.

^c P.C. part I. fol. 244.

By the law of England, which is the rule as to the pains and penalties of treason, as well as what shall infer that crime, such powers or faculties come under the denomination of *Conditions*, viz. where one grants a feoffment of lands to another, on condition "that he may defeat the same, by payment of a sum of money, or performance of a certain act." Thus, mortgages are estates upon condition; for, if the mortgagor pay the money, as covenanted, he gets back his lands. Now, by the statute of Henry VIII^b. among other things, belonging to a person attainted of high treason, that fall under his forfeiture, Conditions are expressly mentioned, which, no doubt, will comprehend the equity of redemption of a mortgage. But, in the English law, a distinction is made between conditions that are personal and individual, and cannot be performed by any other; and conditions that are not so annexed to the person, but that they may be performed by another, and such is payment of money. And it hath been resolved in divers cases, that those of the first kind are not carried by the forfeiture of the party in whose favour the proviso is conceived. Three cases were so adjudged in the reign of queen Elizabeth. Thus, the duke of Norfolk had conveyed his lands to the use of himself, and afterwards to the use of his eldest son in tail, with divers remainders over; with a proviso, "that if he should be minded to alter and revoke the said uses, and should signify his mind in writing, under his hand and seal, and subscribed by three credible witnesses, then the uses should cease." The duke was thereafter attainted of high treason. It was found, that this proviso or condition was not given to the queen, by the act of Henry VIII. because the performance of the same was personal, and inseparably annexed to the duke's person, viz. to signify his mind by writing under his own hand, which none could do but himself; upon which ground all the possessions of the dukedom were saved, and not forfeited by the attainder. This case is mentioned by judge Hale^c, who takes notice of other two cases to the same effect, adjudged in the same manner, viz. that of Sir William Shelly, who made a feoffment to the use of himself for life, remainder to his first, second, or other sons in tail, provided, "that if Sir William tendered a ring, or a pair of gloves to any of the feoffees, or their heirs, *Ipso Gulielmo tunc declarante et expressante*, that the tender was to avoid the deed, then the uses should be void." Sir William was afterwards attainted of high treason, and the question came to be tried, Whether this power of revoking the uses, by such tender, was forfeited to the queen; and it was adjudged, that the same was not forfeited. The third case was that of Wheeler and Smith, which was exactly parallel to that of the duke of Norfolk's, and judged accordingly. In the same place, he men-

⁵⁹. By the law of England, conditions or faculties, merely personal, are not carried by the party's forfeiture.

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tions likewise the case of Englefield, which is fully reported by lord Coke ^a; in it a judgment, different from the former, was given. Sir Francis Englefield had conveyed his lands to the use of himself for life, remainder to his nephew in tail; with a proviso, "that, if Sir Francis delivered or tendered a gold ring to his nephew, to the intent to make void the uses, the same should be of no force." He was afterwards attainted of high treason; and it was ruled by the court of exchequer, that the queen, in the life of Sir Francis, might, by commission, tender the ring, and make void the uses; but this judgment was not relied upon, for a special act of parliament was made confirming the forfeiture ^b.

^a 7 Rep. 12.

^b 35 Eliz.

60. The estate forfeited, where the party attainted stands vested in it, with ample powers and faculties, notwithstanding a personal deed of conveyance of the same.

ALL these precedents were urged, in discussing the claim of the estate of lord Lovat; the case of which was, that he executed a disposition and tailie of his estate in favour of his eldest son, and the heirs-male of his body; whom failing, his second son, and the heirs-male of his body, &c. under strict irritancies, which was duly recorded in the register of tailies, and likewise in the general register, but no infeftment had passed upon it. In this deed there was a reservation of ample powers to my lord to contract debts, and grant securities therefor, real or personal, and to grant feu-rights and wadset-rights of the same at his pleasure: and the question was, Whether the estate was forfeited by his attainder of high treason? and the court found, That the same was forfeited to the crown ^c. But, as the feudal right of the estate still remained in the person of the lord Lovat, this judgment can be no precedent as to naked faculties, or conditions annexed to the person of the disponent: for, since the lord Lovat had the whole fee in him, it was forfeited by his attainder, and there could be no effectual claim made upon the disposition, in respect of the ample powers reserved. Wherefore the question as to such reserved faculties, whether the same, by the law of England, fall under the forfeiture of the person vested therewith, remains still undetermined; and I shall not presume to interpose any opinion in the case.

^c Decem. 1750.

61. The rule, in the law of England, as to forfeitures, in the case of estates in tail.

IT is a question of great moment, How far estates, under strict entails or tailies, are liable to forfeiture, on the attainder of treason of any of the heirs in possession for the time? The law of England must be the rule for the determination, tho' settlements, in such form, are not known in that law, whereof the progress concerning this matter appears to have been thus. By the statute, *De donis* ^d, tenants in tail were prohibited to alien the estate, without express mention of its not being forfeitable by their crimes. The words of the statute are, *Non habeant illi quibus tenementum sic fuit datum, sub conditione, potestatem alienandi tenementum sic datum*. But the prohibition to alien was construed to have included a prohibition to forfeit it by their crimes, as the lord Coke informs us in his comment upon that act ^e, where he has these remarkable words, that *Foris-facere* is *alienum facere*, to forfeit an estate is to alien it; with whom lord Hale agrees ^f. And thus, for a long time, estates-tail remained unalienable, and were not forfeitable by the tenant in tail. But afterwards the judges and lawiers found out the device of Common Recoveries, whereby lands in fee-tail may be aliened; and thereafter the subsequent statute

^d Westm. 2. or 13 Edw. I. c. 1.

^e 2 inst. 334.

^f Hale, P. C. p. 284.

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^a 4 H. IV.
c. 24.

statute of Henry IV^a. allowed them to be alienated by a Fine with proclamations. Tho', by this means, the ground whereupon estates-tail were saved from forfeiture, by the attainder of the tenant in tail, seems to have failed when he came to have a power of alienating the estate, yet their exemption from forfeiture being introduced by statute, it behoved to continue till it was otherwise enacted. And the parliaments were not fond of creating new forfeitures, which were already very frequent during the contests between the houses of York and Lancaster, the origin of which was in the same king Henry IV. But after the entire union of the two houses in Henry VIII. estates-tail were made subject to forfeiture, as falling under the description of Estates of inheritance, in use or possession by any right or title^b.

^b 26 H. VIII.
c. 13.

To apply this doctrine to our tailies. In all cases where the heir of entail can charge the estate with debts, or alien it, tho' only for one-rous causes, such estate is clearly forfeitable by his attainder of treason. So that if the tailie only ties him down from contracting debts, but not from conveying the estate on a sale, or on the contrary, it is forfeitable by his treason. But the great question is, Where the heirs of entail are restrained from both, if the estate is forfeitable by the attainder of the one in possession? and the court of session found, That the same became only forfeited during his life^c. This was in the case of a strict entail, executed by Sir James Gordon of Park, duly recorded, and whereon charter and seisin had followed; and, by it, each heir was declared to irritate his right to the estate, by his contravention, for himself only, but not for the heirs of his body; and Sir William Gordon, the person attainted of high treason, was still living. The estate was claimed by John Gordon, brother to Sir William; and it was adjudged to belong to him after the death of Sir William, without taking notice of the issue-male which Sir William then had, or might leave at his death.

^c Nov. 17.
1750. John
Gordon,
claim of the
estate of Sir
William
Gordon of
Park.

62. This rule applied to the case of entails in Scotland; the judgment of the court of session, upon the case of Sir William Gordon.

^d 26 H. VIII.
c. 13.

THE court considered the interest of Sir William Gordon not as an estate of inheritance, and so to fall under his forfeiture by the statute of Henry VIII^d. but as an estate for life only. For that tho' such heir of entail generally makes up his title by service to the person last in-vest, yet he stands seised in it for his own use only for life, and for the use of the subsequent heirs of entail, for their respective lives, as the estate should descend to them; and Uses are expressly saved by that act. And that tho' the dower and courtesy took place in those entails, unless prohibited, yet such were always incident to estates-tail in England^e, which, notwithstanding, were not originally forfeitable by the attainder of the tenant in tail. And that heirs, in strict tailies, wanting the power of alienation, or charging the estate with debt, the same could not be forfeited by the crimes of any one of them. As to the proviso in the act of queen Anne, which saved only the issue of such marriages as should happen before the act was to take place; whence it was argued, that this tailed estate, which is not in those circumstances, behoved to be forfeited by the attainder of the party in possession, it was considered that a Salvo, to prevent all doubt, in favour of such issue, whose right was founded by the law, as it stood at the time of the marriage contracted, which could not, without injustice, be impeached by a superveining law, could

^e Coke 1.
inst. 224.

63. The grounds whereupon the judgment proceeded.

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could not enlarge the pains and penalties of treason by the law of England, which are ordained in general to take place in Scotland; and therefore all cases of treason with us must be determined by the law of England, as it then stood and remains at this day. And further, that a Saving in a statute can never extend what is enacted in the body of it, more than it can subsist when repugnant to what is in the body ^a.

^a Coke 1.
rep. 47.

64. The judgment of the house of lords upon the case.

AN appeal was entered for the crown, and, at discussing the same ^b, this judgment was given by the house of peers: " They Declare and Adjudge, that Sir William Gordon, the person attainted, being, under the settlement made by his father Sir James Gordon, dated 19th October 1713, seised of an estate-tailie in the barony and estate of Park, notwithstanding such tailie was affected with prohibitive, irritant and resolute clauses, the said barony and estate of Park did, by virtue of the statute of the 7th year of the reign of queen Anne, cap. 21. become forfeited to the crown by the said Sir William Gordon's attainder, during his life, and the continuance of such issue-male of his body as would have been inheritable to the said estate-tailie, in case he had not been attainted: and also for such estate and interest as was vested in, or might have been claimed by the said Sir William Gordon, by virtue of the last limitation in the said settlement, *To the heirs and assigns whatever of the said Sir James Gordon*, after all the substitutions therein contained shall be expired or determined; and that, by virtue of the substitution to the heirs male of the said Sir James Gordon's body, of his then present marriage, the respondent, John Gordon, hath right to succeed to the said barony and estate of Park, after the death of the said Sir William Gordon, and failure of such issue-male of his body as aforesaid, according to the limitations in the said settlement."

^b May 21.
1751.

65. The grounds of the judgment.

THE lords of parliament, I apprehend, considered John Gordon, the next collateral member of tailie, as a remainder-man; and consequently that his estate was saved by the express terms of the act of Henry VIII ^c. The difference between our law, and that of England in this matter was, that, by the statute *de donis*, one who had not power to alien the estate could not forfeit it by his crimes; and that by that act the tenant in tail was simply prohibited to alien the estate, without any reservation as to his forfeiting it by his crimes; but, on the contrary, upon the construction of it, the same did comprehend a prohibition to forfeit it by his crimes. Whereas our statute 1685, which gave strict entails an effectual sanction, expressly left the estates, so entailed, exposed to forfeiture by the crimes of the heirs in possession. And tho' the act 1690 gave relief in that respect, yet that was altered by the 7th of queen Anne. And there is no ground of complaint when tailies are still continued in their original force; with this advantage, that the next member of tailie, not of the attainted person's body, is safe as a remainder-man.

^c 33 H. VIII.
c. 20.

It may likewise be considered, that the saving clause, in the statute of Henry VIII ^d, seems to bar the issue of the party attainted from the interests thereby reserved, and consequently that the entail-

^d 33 H. VIII.
c. 20.

ed

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^a B. 2. tit. 3.
§ 146.

ed estate, so far as concerns them, must be forfeited to the crown. It is in these terms: "Saving to all persons, &c. (other than such " persons which hereafter shall be attainted of high treason, and " their heirs and assigns, and all persons claiming by them, or any " of them, or to their uses) all rights, &c." For the issue of the person attainted behoved to claim thro' him. And tho' the proprietor might order the settlement of his estate, so as the contraveener of the conditions, wherewith it is clogged, should forfeit the same only for himself, and not in prejudice of his issue; yet, in the case of forfeiture on an attainder of treason, the law, inflicting the pains and penalties consequent on such crime, must be the rule. And, as was observed elsewhere^a, that a condition in the tailie, "That up- " on any of the heirs of entail being attainted of high treason, the " estate should go to the next heir," could have no effect; so I may say here, that the private party cannot, by the settlement of his estate, vary the pains of treason, which, by the clause before quoted, extends to all persons claiming by the person attainted. And farther, the public good and safety of the commonwealth was concerned, in not suffering the estate to devolve to the issue of the person attainted; for that were no small encouragement to ill-disposed Persons to engage in rebellions, if their estates were safe to their issue; which ought to overbalance all the seeming considerations on the other side.

As to that part of the judgment touching the last limitation or termination in the settlement, *To heirs and assigns whatsoever of Sir James Gordon*, it can only relate to the issue-female of Sir William Gordon, that in case the estate shall descend to them, after all the substitutions are determined, as heirs at law to Sir James Gordon, the same shall be absolutely forfeited to the crown; because the estate being unalienable by any of the heirs of tailie, it may descend to such issue-female, when the substitutions shall be expired. And since they could only claim thro' Sir William Gordon, the corruption of blood would bar them, and therefore the estate becomes forfeited to the crown, *propter defectum sanguinis*. But if, in virtue of the said last limitation, the estate shall descend to any other person, as heir at law to Sir James Gordon, it cannot be forfeited in virtue of this judgment.

66. The import of the judgment, as to the last termination.

^b B. 2. tit. 3.
§ 11.

I HAVE not taken notice, on this head, of any of the judgments that past before the commissioners of enquiry, or the court of delegates, to whom appeal lay from them, upon the forfeitures, on account of the rebellion 1715; because I did not consider these of any weight to strengthen, and much less to weaken the effect of the solemn judgment at present given by the house of lords. Upon the whole of this question, the case of strict entails, (of which I have largely treated elsewhere^b) in respect to forfeitures on account of high treason, is reduced almost to the same state as fees-tail in England. As the tenant in tail forfeits for himself and his issue in tail; so each member does with us for himself and the heirs of his body: and the interest of the other substitutes, as that of remainder-men in England, is safe.

67. Our strict entails, as to the forfeitures for high treason, reduced almost to the same state with fees-tail in England.

ENTAILS only, that are registred in the record of tailies, are to be regarded, by the express terms of the act 1685; and such only are
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68. The tailie must be duly record- ed, in order

to save the estate from a total forfeiture, by the attainder of the party in possession.

secured from forfeiture, on the attainder of the heir in possession, by the act 1690; because the heir, in that case, has a full power to alien or contract debts on the estate, tho' he stood seised therein with the strict clauses engrossed in his title, such being the express purview of the statute. And notwithstanding that the act 1690 is not the rule as to the pains and penalties consequent upon treason; yet such entails being exposed to forfeiture, by the act 1685, and not aided by the act 1690, they must fall under it by the act of queen Anne: and accordingly the court did adjudge^a.

69. What if the heir attainted had incurred an irritancy before committing the treason.

If an heir, in a strict tailie, had incurred an irritancy, by contracting of debt on the estate, before the attainder, or even the commission of the crime, yet that could not prevent the forfeiture to the crown; because an irritancy, before it is declared by a decree, can have no operation, by the express purview of the act 1685; and since, by the attainder, the estate presently vests in the king^b, it is too late to declare the irritancy after the estate was gone. This was adjudged by the court of session, in the above case of Sir William Gordon, the foresaid irritancy being pleaded as a separate ground of John Gordon's claim to the estate of Park, but over-ruled; and, on his cross appeal, the judgment was affirmed.

^a Jan. 10. 1751. Claimants of Sir James Kinloch's estate.

^b Coke 3. rep. 10.

70. Or was a papist, and the next protestant heir claimed the estate after attainder of the papist.

UPON the like ground, in another case, appearance was made for the protestant heir claiming, on the act 1700, the estate of a papist attainted of treason; but his claim was dismissed^c, because that statute only intitles the protestant heir to serve himself such. But, till he is duly vested with that character, the popish heir is the apparent heir at law in the estate; and all diligences for affecting it must be directed against him as such; and consequently he may forfeit the same by his treason. And the protestant heir, in this case, could not make any effectual claim to the estate, after it was vested in the king by the attainder. It was likewise considerable, that a popish heir had possessed the estate several years, and no step made by the protestant heir toward ascertaining his title.

^c Decem. 12. 1750. Lundin, claimant of the estate of Perth.

THAT I may do justice to a learned and ingenious author^d, I must own, that I am indebted to his labours for much of what I have said on this subject; and the public is greatly obliged to him likewise, for having cleared up the same, since it was not a little involved.

^d Considerations on the law of forfeiture for high treason, printed anno 1748.

71. The estates of persons forfeited, on account of the rebellion 1715, vested in trustees, for the use of the public, and the claims thereon determined by them.

MANY persons having been forfeited on account of the rebellion 1715, their estates were, by statute, vested at first in his majesty, for the use of the public^e; and thereafter in trustees likewise for the same purpose; and the produce was to be applied towards payment of the public debts, after answering all just claims thereon; as they should be ascertained by the trustees, to whom powers were conferred for that end^f. But those statutes were only calculated for that particular rebellion, and concerned only the estates of such persons as should be attainted before the 24th day of June 1718, for any high treason that had been committed before the first day of June 1716, and so can be no rule in other cases.

^e 1 Geo. I. c. 20.

^f 4 Geo. I. c. 6.

THUS

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^a 20 Geo. II.
c. 41.

^b Nov. 16.
1750. claim-
ants on the
estates of
Gordon of
Tarperfy.

^c 1 Geo. I.
c. 19.

THUS likewise, after the rebellion 1745, an act^a was made, vesting in the king the estates of persons attainted of high treason, committed before the time therein limited; and adjudging the same to be in the actual and real possession of his majesty, without any office of inquisition thereof found, or declarator of forfeiture obtained. And the barons of exchequer were enjoined to enquire into, and survey the same so vested, and to enter the names of the persons attainted, and their estates, into a register, and to dispose of the estates, as therein directed. And the claims of creditors or others thereon were to be entered before the court of session within the time therein limited, and discuss summarily by them. But claims on debts contracted, or deeds granted by the forfeiting persons, from and after 24th June 1745, on which day their estates were declared vested in his majesty, are not to be received, even tho' the parties were willing to prove the onerous cause, or valuable consideration, for which the same were granted^b; because that day was, by the legislature, taken to have been the time of committing the treason. This act plainly concerns the high treasons only, that were, or should be committed within the time therein mentioned; and cannot therefore stand as a general rule, more than the other act aforesaid, touching those perpetrated in the rebellion 1715.

72. The estates of those attainted for the rebellion 1745, vested in his majesty, and the claims thereon to be determined by the court of session.

BUT the statute, intitled, "An act for encouraging all superiors, landlords and tenants in Scotland, who shall continue in their duty and loyalty to his majesty king George, &c." seems, in most particulars, to have been intended as a perpetual law, with respect to the high treason therein described; and therefore 'tis proper to give a summary view, how the case of those just mentioned, and creditors is thereby regulated. For encouraging the subjects in Scotland to continue stedfast in their loyalty, it was, by the foresaid statute, enacted, "That if any subject, having lands or tenements in Scotland, in property or superiority, holden of the crown, had been, or shall be guilty of high treason; by holding correspondence with the pretender, or others employed by him; or remitting or paying money knowingly for his use or service; or adhering to him, by giving him aid or comfort; the vassals of the offender continuing in dutiful allegiance to his majesty, his heirs or successors, are intitled to hold the lands and tenements, by the same manner of holding, as the offender held the same of the crown at the time of the attainder. And if a vassal, holding lands of a subject, shall be guilty of such high treason, his lands shall recognise and return to the superior, continuing in his dutiful allegiance, in the same manner, as if they had been resigned in his hands, *Ad perpetuam remanentiam*." And every tenant likewise, who shall continue peaceable, is intitled to possess the lands, occupied by him, for two years, without payment of any rent, if the master shall be attainted of such high treason, to be accounted from and after such attainder; and the tenant being attainted thereof, forfeits his tack, with his fingle and liferent-escheat to the master, who remained peaceable. Provided always, "That, in case the superior, vassal or tenant shall not, within six months, to be reckoned from the time of the attainder, obtain themselves infest, or do diligence, without collusion, for attaining possession, the forfeiture foresaid shall belong to the king." It is likewise

73. The act in favour of superiors, vassals, tenants and creditors, a perpetual law, so far as concerns their interest; the same particularized.

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likewise provided, " That no attainer, on account of the foresaid
 " high treason, shall exclude the right or diligence of any creditor,
 " remaining peaceable and dutiful, for security and payment of any
 " true, just and lawful debt, contracted before the commission of
 " the crime."

74. The superiors and vassals liable to a proportion of the debts: how far creditors preferable to the interest of the tenants.

IN the above case, the superiors and vassals are liable to a proportionable share of the debts of the person attainted, answerable to such estates as shall be found to belong to them respectively^a. Tho' the debts are not made real by the statute; yet, in a question with the superior, who, in virtue of the statute, seized the vassal's estate, or the superior's creditors arresting the rents of such estate, the forfeited vassal's creditors are preferable^b. But, in a question with the tenants, as to the two years rents, the creditors were only preferable, in case they had arrested the rents before the attainer; for otherwise the statutory release to the tenants will exclude them^c.

^a 5 Geo. I. c. 21.

^b July 5. 1734. viscount of Oxenford.
^c Dalrymple, July 6. 1716. creditors of Kilsyth.

75. This act repealed in time coming, as to the benefit of superiors; but still subsists in relation to other particulars.

THE parts already recited of the statute aforesaid, 1 George I. seem to have been intended to be perpetual, with respect to high treason committed in favour of the pretender. But this act is repealed in all time coming, as to the clause in favour of the superiors, reserving to the ordinary courts of justice to determine how far it subsisted before the repeal in that particular^d. Accordingly the court of session have found, that it was a subsisting law, in the above respect, before the repeal^e. And therefore this act is still in vigour, and will be effectual, during the pretender's life, in respect to the benefit thereby granted to vassals, to hold their lands of the crown, upon their superior's being attainted of the treason therein described. And the court hath found, that apparent heirs, in the superiority, had the benefit of the act^f; wherefore the apparent heir of the vassal must also be intitled. The creditors of persons attainted of such treason are safe, and the proviso, in relation to tenants, still subsists, since these clauses in the act aforesaid are not repealed.

^d 22 Geo. II.

^e Decem. 14. 1748. Farquharson. Jan. 24. 1750. duke Gordon.

^f Feb. 13. 1750. duke Gordon.

76. Other clauses in that act only temporary; how far the clause, touching settlements of estates since August 1. 1714, such.

THERE are other clauses in the same statute, of the first of the late king, which were temporary, and only concerned the rebellion that then was; particularly that which declares all tailies, settlements or deeds of alienation made before the first of August 1714, or that shall be made in time coming, by persons that shall be convicted and attainted of the high treason mentioned in the statute, void and null; excepting such deeds as shall be made for just and onerous causes, to be instructed otherwise than by the writings themselves: for the preamble of that clause sets forth, *That there was reason to believe, that several persons intending to commit high treason, as aforesaid, have made tailies, &c. with a fraudulent intent to avoid the punishment of the law due to such offences, &c.* which plainly refers to the then present rebellion, and cannot be extended to other cases; and it were most unreasonable it should; for thereby not only all gratuitous settlements, but even deeds of conveyance, for valuable consideration, executed after first August 1714, should be voided, on the party's committing the high treason referred to in the act, unless an onerous cause were instructed, otherwise than from the deeds themselves, which, tho' true and real, cannot, for most part, be so proved. Thus, likewise, the

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the clause touching letters for charging persons to compear within a limited time, and find caution for their loyal and peaceable behaviour, under the penalty therein mentioned; and that concerning additional powers to the lords lieutenants of counties to search for, and seize arms, &c. are plainly temporary concerning that rebellion only.

WHERE the subject-superior took the benefit of the late statute, on occasion of the vassal's being attainted, as accessory to the rebellion 1715, or 1745, and thereafter conveyed the estate to the heir of the family gratuitously, which was commonly done, and gave occasion to repeal the clause in that behalf, such heir is liable to the debts of the forfeited vassal, in the same manner as the superior himself, by force of the statute. But it can be no passive title, since the gift of the estate may have been granted during the rebel's life; and, tho' it should happen to be made after his death, yet the rebel was denuded by the forfeiture, and could have no heir; so that the provision in the act 1695, touching apparent heirs, could have no place.

77. How far the conveyance of the estate to the presumptive heir of the forfeited person, subjects him to the debts.

THE forementioned statute of the first of the late king, concerns only persons attainted of treason, in favour of the pretender, therein mentioned, as above. And therefore, notwithstanding its being a perpetual law, in that respect, as to the provisos in favour of the vassals and creditors of forfeited persons, yet it can be no general rule as to all high treasons, and in all time coming; and therefore, since the law of England is the rule, and not the act 1690, in judging of the consequences of high treason, 'tis proper to inquire what subjects fall under forfeiture, and what claims are saved against it, by that law.

78. How far claims on forfeited estates are saved by the law of England.

THE act of the 25th of Edward III. is the original standard in this case. By it the person, attainted of high treason, forfeits to the king all his lands and tenements, as well those holden by him of others, as of the king; which is extended to rents, commons, corodies, and other hereditaments, which are not holden of any person; for, in cases of high treason, the tenure is not material^a. Here goods and chattels are not named, but the forfeiture of them is implied in the judgment^b. This statute does not comprehend estates-tail, or conditions; nor rights of entry, where any was, in respect to lands, by title before the treason committed. But the forfeiture of these (except as to rights of entry) on an attainder of treason, is introduced by later statutes^c. However, rights of entry stand upon the same foot still, as by the act of Edward III.

79. Subjects that fall under forfeiture by 25 Ed. III. or by later statutes.

^a Coke 3. inst. p. 19.

^b Coke ibid.

^c 26 H. VIII. c. 13. 33 H. VIII. c. 20.

In those later statutes, in the case of forfeiture of persons attainted of high treason, there is a clause (before touched upon) "Saving to all persons, and bodies politic, and their heirs, assigns and successors, (other than such persons who shall hereafter be attainted for high treason, their heirs and assigns, and all persons claiming by them, or to their uses) all such right, title, use, possession, entry, reversions, remainders, interests, conditions, fees, offices, rents, annuities, commons, leases, and all other commodities, profits, and hereditaments whatsoever, they should, might, or ought to have had, as if the act had never been had nor made^d." And the

80. Rights saved from forfeiture by the statutes of Hen. VIII. particularized.

^d 33 H. VIII. c. 20.

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Salvo, in the preceeding act of the same king, is much to the same purpose, tho' not quite so extensive^a, which saving clause is the principal rule for determining in this matter.

^a26 H. VIII.
c. 13.

81. All debts that create a real lien upon the estate forfeited, saved to the creditors; how far personal claims safe.

THE Salvo, in these statutes, secures all Real interests, competent to any person upon the lands and tenements of those attainted of high treason, that the same shall not fall under their forfeiture. And consequently mortgages, judgments, bonds in judgment, statutes merchant and staple, recognizances of the nature of statutes staple, are safe against such forfeiture; because they create a real lien, which is an Interest in the lands of the debtor, and therefore cannot fall under his forfeiture. But, I cannot observe any security, by the law of England, to personal creditors, that their debts shall found any claim upon the estates, real or personal, of their debtor attainted of high treason: only the offender, before attainder, may apply his goods to payment of debts; or to the subsistence of his wife and family, and is barred only from disappointing the forfeiture, by fraudulent deeds^b; and consequently lawful creditors may attach such goods before sentence.

^b Coke 1.
inst. 114.
5 rep. 110.

82. All inheritments and real burthens upon the forfeited estate, as likewise faculties reserved, and debts whereon inhibition was used, are safe.

IN virtue of the above Salvo, I conceive that, with us, all inheritments, whether of fee, liferent or annualrent, and all servitudes, and, in short, that all real burthens, in favour of other persons affecting the lands, that fall under the forfeiture of a person attainted of high treason, are saved from the effect of such forfeiture. And, I apprehend likewise, that personal debts, whereupon inhibitions had been served against the debtor, before the treason committed, will found a good claim upon the estate, thereafter forfeited by his attainder for high treason, since the debtor can do no deed in prejudice of the inhibitor's debt; and, in that respect, an inhibition creates a real interest in the estate; and, by the law of England, as above, to forfeit an estate by crimes is to alien it^c. And all faculties competent to any person upon the lands, vested in the person attainted, may be exercised thereafter by those to whom such faculties belong. The case of personal faculties, and strict entails, hath been already considered.

^c Coke 2.
inst. 334.

83. Attainder of treason, at common law, has the same effect as by act of parliament; the trial of such offences committed abroad.

IT is declared by statute, That, in every case, an attainder of treason, by the common law, shall be of as good strength, force and effect, and that the king shall have as much benefit and advantage by such attainder, as if it had been done by authority of parliament, and shall be deemed and adjudged in actual and real possession of all lands, and all other things of the offender, so attainted, without any office or inquisition to be found of the same^d. And, by another statute^e, it is enacted, "That all offences declared to be treasons, misprisions of treasons, or concealments of treason, done or committed out of the king's dominions, shall be tried before the justices of the king's bench, by good and lawful men of the same shire, where the same court shall sit, or else before such commissioners, and in such shire of the realm as shall be assigned by the king's commission, in the same manner and form, as if the same had been committed in such shire." By the same rule, attainders of treason before the court of judiciary, or commissioners of oyer and terminer in this

^d33 H. VIII.
c. 20.
^e35 H. VIII.
c. 2.

this country, must have the same effect as if they were by act of parliament. *Quær.* If treasons committed abroad can be tried here?

SECTION III. *Pardon, or Restitution of Persons attainted.*

A PARDON by the king, as to crimes, is a work of mercy, whereby either before attainder, sentence or conviction, or after, his majesty forgives any offence, punishment or execution. It is either General or Special, by charter from the king, and must always be pleaded. They are either Absolute, in which the party may be aided by averment only; or under Condition, Exception or Qualification, in which a writ of Allowance out of the chancery, testifying that the condition is performed, must be had, as that surety is found, &c. And it is an antient and constant rule of law, *Non poterat rex gratiam facere cum damno et injuria alterius*; and therefore, in an appeal of death, &c. the king cannot pardon the defendant; because it is the suit of the party for revenge^a. And, for the like reason, tho' the king may pardon the execution, and restore the party or his heirs to the lands forfeited by the attainder of treason, yet he cannot make restitution of the blood; because it would be to the prejudice of others^b.

84. The king's pardon either general or special; absolute or conditional; cannot be to the prejudice of another.

WHEREFORE restitution of blood can only be by act of parliament, and some restitutions are limited to That only, and thereby the party restored may be heir in blood to the person attainted, or others his ancestors, but not to inherit their honours. This is a restitution *secundum quid*, or in part: other restitutions by statute are general, to blood, honours, inheritances, and all that was lost by the attainder. This is *restitutio in integrum*, or an absolute restitution^c.

85. Restitution, by act of parliament, either in part or total; must it be pleaded.

AFTER rebellions are suppressed, and a few examples made of some most deeply concerned, an act of Indemnity is, for the most part, made for the king's general and free pardon, with such exceptions as are thought necessary for the safety of the commonwealth. This was done by his present majesty in a most bountiful manner^d, and will no doubt raise a due sense of gratitude in those who were artfully led into treasonable practices, that they shall not stand in need of the like mercy for the future, as is suggested in the preamble of the statute. If such act is general and absolute, the court must take notice of it, tho' the party plead not the same: but when those general pardons have many exceptions of persons and offences, as frequently is the case, the court cannot take notice of them; and therefore the party, in order to have the benefit, must plead the same^e.

86. A general act of indemnity, with some few exceptions, ordinary after rebellions.

A PERSON forfeited upon an attainder of treason, by our former law, might have been restored by act of parliament, either *ex gratia*, by way of grace, or *ex justitia*, by way of justice. A restitution *ex gratia* supposed the sentence to be just, and liable to no challenge, and therefore was an act of pure favour, and proceeded by way of grace^f. In this case, regularly, the rights of donataries to the forfeiture, granted before such restitution, remained unprejudiced^g; because such grants cannot hurt the rights of other persons duly constituted before.

87. Persons restored *ex gratia* cannot question former grants.

A GRACIOUS

^a Coke 3. inst. 233, &c.

^b Ib. 240.

^c Ib. 240. 5 Geo. II. c. 22.

^d 20 Geo. II. c. last.

^e Coke 3. inst. 234.

^f P. 1584. c. 135. ^g P. 1606. c. 4.

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88. The effect of a restitution *ex gratia* of old with us; the case now otherwise.

A GRACIOUS restitution of the forfeited person's heir, and there-with a grant of the forfeited estate to him, had this effect, that he was in the same case as any stranger grantee, and no otherwise liable to the debts or deeds of the forfeited person, or his predecessors, than any other donatary: for he carried the estate in the right of the crown. This was frequently, of old, most pernicious to creditors of the forfeited person, and to the vassals holden of him, whose rights were not confirmed; for the heir of the person, restored in this manner, took the benefit that was competent to the crown, and, by that means, avoided them; but, by the later statutes, and our present happy establishment, all such hardships are prevented.

89. Restitution, *ex justitia*, can only be by the parliament.

RESTITUTION *ex justitia*, or by way of justice, is, by act of parliament, rescinding or declaring the sentence of forfeiture void, as if it had never been. In this case the rights of donataries fell to the ground, and sometimes, on special considerations, they were declared answerable for the bygone rents, or profits of the forfeited estates received by them, as in some particular cases after the revolution^a: but regularly the donataries were only liable for what they received of the rents after the date of the act rescissory^b.

^a P. 1690.
c. 16, 18,
and 31.
^b P. 1695.
c. 5.

90. The effect of such restitution.

THIS restitution naturally implies that the person restored shall be in the same, and no better case than if the forfeiture had not proceeded. And consequently he must be liable to the debts of his predecessors, in the same manner as before the forfeiture; or, if it is the forfeited person's heir that is thus restored, he must be subjected to all the debts of the forfeited person; for it is in his right only that he has the benefit, and he must make up titles by service or confirmation, as heir or executor to him.

SECTION IV. *The Escheats of Bastardy, and Last Heir.*

91. The escheats of bastardy and last heir, in most cases the same; but in some respects different.

OTHER two ways whereby all the effects, heritable and moveable, that belonged to a person deceased, fall to the king, are, 1. on account of the bastardy of the proprietor deceased; 2. when there is none to represent the proprietor by a proof of lawful propinquity. For then his majesty's right of prerogative takes place; in the first case, because a bastard can have no heir at law; and in the second, because the party has none by blood-relation, and the king is *Ultimus hæres*, or last heir. Neither of these can, with propriety, be called a Confiscation, since no party's right is taken from him and forfeited; but only for want of an owner it goes to the king, by the maxim, *Quod nullius est cedit domino regi*: but they having the same effect as confiscations, are reckoned among them. In both cases the crown's right may be deemed as *ultimus hæres*; for it is because a bastard has no heir, that the king, by his royal prerogative, carries the subjects of the succession, and, for that reason, I have conjoined them. At the same time, where one party has a gift of bastardy, and another that of *ultimus hæres*, with regard to the same person deceased, if the decease is found to have been a bastard, the donatary to the bastardy will be preferred; but otherwise, the donatary to the escheat of *ultimus hæres*^c; so that those escheats pass by different gifts, and therefore are in some respect distinct. The escheats of bastardy and last heir

^c Jan. 15.
1676. Swin-
ton.

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heir belonging to the king by his prerogative, were not included in a right of regality, but must have been specially mentioned in the erection ^a, as for most part was the case; and now, regalities being abolished by the late statute ^b, the question is at an end.

^aFount. Feb.
18. 1712.
Sibbald.
^b 20 Geo. II.

BASTARDY of one takes place where his parents never had been married persons, nor cohabited in that character. As to the constitution of marriage, solemn or clandestine, and likewise as to the condition of bastards, I have spoken elsewhere of the same ^c, and shall add but little here. If the parents were truly married, but in such circumstances that lawful marriage could not consist between them, as being within the forbidden degrees, or either of them married to another person still alive, whether the marriage *de facto* shall sustain the legitimacy of the children procreated before the lawfulness of the marriage was challenged, I have likewise discussed it in the place before quoted ^d.

92. Bastardy, how inferred.

^c B. I. tit. 2.
and 5.

^d B. I. tit. 5.
sect. 3.

It is observable on this head, that it was our law, in antient times, that the subsequent marriage of the parents did not legitimate the children procreated before such marriage. The case is largely treated in two several chapters of our *Regiam majestatem* ^e, where the case is put of an objection moved to one's serving heir to his parents, "that he was a bastard incapable to inherit, as being born before the marriage of his parents." On such occasion a brieve was directed to the bishop to enquire into the fact, and to certify how the case stood, and the service in the mean time was stopt, the spiritual court being only competent to cases of legitimacy; and, if the bishop certified that the party was truly born before the marriage of his parents, he was barred from the succession as a bastard. The form of the brieve is set down ^f, and there it is expressly settled, "that tho' such child is lawful by the civil and canon law; yet, by the law of this realm, he shall be holden as a bastard, and not be suffered or heard to claim any heritage as lawful heir ^g."

93. Of old, children born before marriage of their parents, were not legitimated by the marriage.

^e Lib. 2. c. 50.
51.

^f C. 50.

^g D. c. 51.

AT what time our law, in that respect, was altered, does not appear. We have no statute to that purpose: wherefore it has been discontinued by universal practice to the contrary; and more especially after the institution of the college of justice, *anno* 1537, where the majority of the court of session being churchmen versed in the civil and canon laws, if the case came before them, they would no doubt give their determination according thereto, *viz.* That the children were legitimated by the subsequent marriage of their parents; since we find that it was our settled law, that legitimation, by subsequent marriage, antiently did not take place, and that thereafter it became our established law that it does, and yet we find no statute introducing that signal alteration.

94. It is now our established law, that subsequent marriage of the parents legitimates the children born before.

I CANNOT but take notice, on this head, how improperly Sir George Mackenzie introduces, as an example of this kind, the case of our Robert II. which he states, As if that king had first begot three sons upon Elisabeth Mure, out of marriage, and thereafter intermarried with Euphame Ross, of whom he had two sons; and that, after the death of that queen, he married Elisabeth Mure, in order

95. Sir Geo. Mackenzie's instancing in our king Robert II. the legitimation of children by subsequent

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marriage
noted.

to legitimate his children with her, the eldest of whom was Robert III. who succeeded him in the kingdom ^a. The fact itself is exploded by divers authors as a mere fiction, who uncontestedly prove that Elifabeth Mure was dead before the king's marriage with Euphame Rofs, and that Robert III. was acknowledged prince and presumptive heir of the crown, before Euphame Rofs's death ^b. Sir George suggests, that there was an act of parliament, by which the children of Elifabeth Mure, in respect of their legitimation, by the king's supposed subsequent marriage with her, were preferred to the children born in lawful marriage. But there never was any such statute, and Robert III. (first called John) succeeded without the least surmise of any disability on that head, or any claim made by the sons of Euphame Rofs, or the least insinuation of such.

^a Mackenzie
preced.
quest. 19.

^b Ruddiman-
ni notæ in
Buchan. in
vita Rob. II.
et authores
ibi laudati.

96. The fact
disproved by
Sir George
himself.

SIR George Mackenzie was afterwards convinced of his mistake by undeniable documents which he had seen, shewing the case to have been as I have just related; particularly a solemn act of parliament, having the seals of the members of parliament still appendant thereto, by which they swear allegiance to Robert II. the first king of the Stewart's race, and after him to John his eldest son, (afterwards called Robert) and to all his other sons in due course, according to their seniority, and the heirs-male of their bodies respectively ^c. This was an act of settlement natural to happen upon the accession of a new family to the crown; it bears date 27th March 1371, within a few months after David II. his uncle's demise; and was made after Elifabeth Mure's death, and during the life of Euphame Rofs his second queen; and in it John is designed Earl of Carrick, and Stewart of Scotland, the peculiar titles of the presumptive heir to the crown. This act is still extant among the records of our parliaments; as are the various other evidences referred to by the above authors.

^c Essay, intitl-
ed, The
lawful suc-
cessor to the
crown, &c.
p. 49. print-
ed anno
1684.

97. Whether
does legiti-
mation give
right of pri-
mogeniture
in prejudice
of issue law-
fully born.

AND tho', by analogy from the later civil law, the legitimation of a son, by the subsequent marriage of his parents, would give the right of primogeniture, even in prejudice of lawful children of a marriage intervening between the birth of the child and the marriage of his parents, as I have shown elsewhere, and insinuated it to be our law, by referring to Sir George Mackenzie, in his above mistaken instance ^d; yet, upon examination, I conceive, it is not our law: for such legitimation must be without prejudice to the other children already procreated of a lawful wife, and consequently such legitimated child cannot, as in the right of primogeniture, succeed to the land-estate, or honours of the father, to the prejudice of him, who, at his birth, was the eldest lawfully begotten son. The inconveniences in the other plan are great, the arguments strong, and the authorities conspicuous against it, as they are related by Tyraquil, who is of opinion against the retroactive virtue of such legitimation ^e. Indeed Voet pretends to answer them all ^f. But I apprehend, as to feudal subjects and honours, the issue lawfully born ought not to suffer any prejudice as to the right of primogeniture, by the subsequent marriage of their father with his former concubine; as to whom her children ought only to be holden as if they had been begotten after the marriage of their parents; for it were miserably hard, and even unjust, that, where a peer or honourable gentleman, of a great

^d B. I. tit. 5.
§ 54.

^e De jure
primog.
quest. 34.
^f Ad tit. ff.
de concub.
§ 11.

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great estate, marries suitably, and the wife and her friends justly had a view that the issue should inherit his honours and estate, they and the children should be disappointed by such unforeseen event. Indeed the inconveniencies might be prevented, as to the estate, where he is an absolute fiar, by providing it to the heirs of the marriage; but it could not as to the honours, nor as to estates under a strict entail; for then, if legitimation had such retroactive virtue, the son of the concubine, thus legitimated, behoved to succeed as heir-male to both honours and estate, without possibility of avoiding it. At the same time the legitimation has a retrospect to the time of the conception, so as, unless marriage between the parties would then have been lawful, it supervening thereafter cannot legitimate the child, as I have observed in the place before referred to; in which respect alone the retroactive virtue of such legitimation ought to be regarded. The right of primogeniture took no place among the Romans, and therefore it is not to be wondered that the legitimation, by subsequent marriage, obtained as to all effects with them, since it could operate no further than to put the children of the concubine in the same state with the other children lawfully begotten; but the case alters in states erected upon the feudal constitution, where the privilege of primogeniture is universally received. At the same time it may seem, that it had been holden for law with us, ever since the mistaken notion of some of our historians touching Robert II.'s pretended legitimating his children with Elisabeth Mure, by a subsequent marriage with her after the supposed death of Euphame Ross, of whom he had sons, and which at first induced Sir George Mackenzie into an error upon that head, till that account of the matter was detected to be a mere fiction. After this discovery there was no foundation for pretending it to be our law, that one's subsequent marriage with his concubine could legitimate their children, so as to give her eldest son the right of primogeniture, in prejudice of the lawful issue of an intervening wife deceased.

BASTARDY is likewise inferred from the husband's being at such distance from the wife at the time, when the child, by the course of nature, must have been begotten, that he could not be the father. Some latitude will be here allowed, more especially if the husband, at the time of the birth, did not controvert the child's being his. Illegitimacy is also inferred, if the husband was labouring under a distemper or disease, at the time of the conception, that rendered him incapable of procreation. The confession of both spouses, that the child is not the husband's, will be sufficient to bastardize him; but the affirmation of any one of them will not prejudice the state of the child^a. The maxim, *Pater est quem nuptiæ demonstrant*, That the husband is always presumed the father, so strongly operates in favour of the children, that nothing less than the confession of both parties, or an utter impossibility of the husband's being the father can take it off.

^a Craig feud. lib. 2. dieg. 18. § 15.

98. Illegitimacy of the children how otherwise inferred than from the parents not being married.

IF the bastard has lawful issue, or if there are heirs of tailie or provision, in the rights belonging to the bastard, failing of him without heirs of his body, the escheat takes no place. It is doubted by some, whether an heir of tailie or provision can make up titles in

99. In what cases the escheat of bastardy takes place, and the reason of

its falling to the crown; a bastard may have heirs of tailie and proviſion.

in order to ſucceed to a baſtard, in default of heirs of his own body^a. But I can ſee no difficulty in the caſe, for tho' ſucceſſion with us is only of relations on the part of the father, and that a baſtard, in the judgment of law, has no father; yet what can hinder one to ſerve heir of proviſion to him in particular ſubjects, which has no reſpect to blood-relation or propinquity to the baſtard, but only to the deſtination of the eſtate? But, if there is no ſubſtitution of heirs of tailie or proviſion, the baſtard dying without lawful iſſue, or the iſſue thereafter failing, there is place for the king's prerogative. The king has right to all the effects of the baſtard, by the eſcheat of baſtardy, and to ſuch as belonged to his lawful iſſue, as *ultimus hæres*, or laſt heir. The reaſon of this eſcheat is, that a baſtard is ſaid to be procreated *incerto patre*, and ſo is underſtood in law to have no relations by the father^b; and, in ſuch caſe, there being no ſucceſſion with us of the mother, or of the relations on her part, the effects of the baſtard muſt fall to the king as vacant, and caduciary. And, for the ſame reaſon, if the proprietor dies, having none that can prove propinquity to him on the part of the father, the king's prerogative takes place.

^a Dirlt. (baſtardy) et ib. Stewart.

^b Nov. 6. 1624. Bonnington. July 13. 1626. Haltree.

100. Of old, the eſcheat of baſtardy fell to the king, but of laſt heir to the ſuperior; at preſent both belong to the king.

DISTINCTION is made, in our old law, between the caſe of baſtardy and that of laſt heir, that the baſtard's eſtate eſcheats to the king, but that the eſcheat of laſt heir falls to the ſuperior, of whom the lands are held^c; and which the learned Craig delivers to us, as our law, in his time^d. But, tho' this may be conform to the original ſtate of feudes, when they were gratuitous grants to the vaſſal, yet there is no reaſon, at this day, for the ſuperior's claim in ſuch caſe, ſince they are now reduced almoſt to the ſtate of other rights, and paſs in commerce. Wherefore the ſuperior having made a full alienation of the fee, there is no ground for its return to him in default of heirs of the vaſſal, unleſs he has made ſuch reſervation in his grant; and conſequently it muſt fall to the king, as every other thing does that wants an owner, in virtue of the royal prerogative. Nor can I ſee any reaſon, for making a difference between the eſcheat of baſtardy, and that of laſt heir, in this reſpect: for a baſtard's eſtate goes to the king only, becauſe he has no heirs of his own body, and that he can have no other lineal heirs; as the other's does, becauſe he has none.

^c Reg. maj. lib. 2. c. 52. c. 55.

^d Lib. 2. dig. 17. § 12.

101. How the donatary to the baſtardy proſecutes his right, and with what debts or deeds burthened; how the creditors make their debts effectual.

If the king, as in other caſes, grants a right of the eſcheat of baſtardy to a donatary, the grantee muſt declare his right, in order to make it effectual; the ſummons of declarator muſt be executed againſt All and Sundry, at the market-croſs of the head-burgh of the juriſdiction where the baſtard had his reſidence; and, if out of the kingdom, at the market-croſs of Edinburgh, pier and ſhore of Leith, that all perſons pretending intereſt may compear and plead it. In this action the donatary muſt prove, that the deceased was reputed baſtard in his life. Nor will the negative, "that his parents "were never married," avail to burthen the defender to prove actual marriage of the parents, that, in many caſes, being impracticable^e. And, if one was reputed lawful till his death, it may be thought, that his State cannot regularly be called in queſtion thereafter; at leaſt, as by the civil law, after five years from one's death, it was not lawful to bring under challenge his ſtate, if he died a reputed freeman;

^e March 22. 1634. Ochiltree. Jan. 6. 1680. Somerville. June 15. 1676. Livingſtone.

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^aTit. ff. et c.
ne de stat.
defunct. post
quin. &c.

freeman^a; so it may seem, that after this example, one's legitimacy ought not to be challenged after such period. But this matter has not been cleared by any precedent that I know; so that no bar seems to lie against a declarator of bastardy, even after the period aforesaid.

^bSup. sect. 3.

THE decree of declarator perfects the donatary's right to the escheat of bastardy, with respect to moveables, as in the case of single escheat; but, to complete his right to the heritable subjects carried thereby, he must be infeft therein. This will be done of course, upon a signature presented to the barons of exchequer, as to lands holden of the crown; but where they hold of a subject, the king grants in favour of the donatary a presentation to the superior, in the same manner as was usual in the case of a donatary to a forfeiture in lands holden of a subject, as I formerly observed^b. But, in such cases, there must previously be obtained a decree of general declarator on the gift.

^cJune 20.
1671. Alex-
ander.

^dJune 20.
1747. Reid.

THE donatary to the bastardy is in place of the heir, and must perform what was incumbent on the bastard, but is no further liable to his debts or deeds, than to the extent of the effects. The creditors may pursue the donatary to have their debts ascertained, and upon such decree insist for execution against him, so far as he has received of the effects; or may otherwise affect the subjects that belonged to the deceased for their payment^c. The heritage that belonged to the bastard may be adjudged, by calling the donatary and officers of state, against whom there must be a decree declaratory, in order to affect it; or against the officers of state alone, if there is no donatary^d.

102. How the
estate and
effects of the
bastard affect-
able by his
creditors.

THE escheat of bastardy is burthened, or even wholly excluded, by deeds of the nature of those *inter vivos*. Effectual obligations or conveyances, to take place either in his life, or even after his death, granted by the bastard, will bar it, for he has full power to dispose of his effects by such deeds; and, if the same want executive clauses, as a procuratory of resignation, or precept of seisin, to complete them, there must be an adjudication in implement led against the officers of state, in order thereto, the crown being, in that respect, in place of the lineal heir of the bastard. But he cannot, by testament; disappoint the crown, unless he has obtained letters of legitimation from the king, the effect whereof is, that he can make a testament: or, if he left a wife, she will have a terce of his lands, and get her legal share in the communion of goods. His lawful issue likewise succeed to him; and, with respect to them, he may, without any grant of legitimation, dispose of subjects testamentary; and proportion his effects among his children as he thinks fit, and name tutors and curators to them, in the same manner, as any person lawfully born may, the king having no interest in such case.

103. How
the escheat
of bastardy
excluded.

THE bastardy is intirely excluded, upon supervening marriage between the parents; or, if they openly cohabited, and owned one another as man and wife, as above; and, in a doubtful case, the presumption lies in favour of the children. If any was served heir to the bastard, that being a sentence, must be removed by reduction, before the donatary can make his gift effectual. Nor will the excep-

104. What if
the objection
of bastardy of
the deceased,
is made to
one offering
to serve heir
to him; or

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of the heir
himself.

tion of the bastardy of the predecessor stop a service to him^a; unless at the instance of the king, or his donatary, none other having a proper interest to make it; for, if that were sustained at the suit of any other, all services might be obstructed on such pretence. But, if the exception is made against the party offering to serve, the service will be stopt, till the objection is discussed on a suit before the commissars of Edinburgh for that purpose; and, in the mean time, the objector finds surety for the party's damages and expences; and five months for discussing the question is the period which Craig limits on that occasion^b; but that must depend on the circumstances of the case.

^a July 20.
1626. Mac-
Culloch.
Jan. 15.
1629. Corf-
bie. Spots.
(bastardy)
p. 30. Cran-
ston. Jan. 15.
1676. Swin-
ton.

^b Feud. lib. 2.
dieg. 18. § 7.
8.

105. In what
the escheat of
last heir dif-
fers from
that of bas-
tardy.

LITTLE needs be said upon the escheat of *ultimus hæres*, or last heir, the same being in most respects coincident with that of bastardy; and therefore, what is already observed on that head, shall be holden as here repeated. Any person proving his propinquity, on the part of the deceased's father, in the remotest degree, will exclude it; because the crown's right only takes place when the estate is caducary, thro' want of a lawful heir. The king, or his donatary, is burthened, in the same manner, with the debts and deeds of the deceased, as has been said in the case of bastardy; and the donatary makes his right effectual, by declarator, in the same method as a donatary to the escheat of bastardy^c. The creditors may confirm executors-creditors; as it would seem they may likewise do to a bastard, that being a step of legal diligence to affect the subject for their payment.

^c Craig, lib. 2.
dieg. 17. § 12.
Dir. decif.
38.

106. In a
grant of lands
to one, and
the heirs of
his body,
whether do
they fall to
the king or
superior, in
default of
such heir.

It has been thought by some, that in lands holden of a subject, the superior returns to his right in default of issue of the vassal, where the lands were disposed "to him, and the heirs of his body," without any farther termination; on this ground, that it was a limited fee, and that the superior, in such case, is not fully denuded^d. It is true, that, according to our antient law, the respective superiors, in default of heirs of the vassal, entered to the several fiefs holden of them; or even, if there was a controversy touching the succession, they assumed the possession till it was decided, and the lawful heir of the vassal ascertained^e. And indeed, if the vassal's fee is considered as a servitude of *usufruct*, or an estate for life, as it originally was supposed to be, when that fails, the lands must have remained with the superior in full right, free of the incumbrance. But now, when fiefs are rights of property, and become in many respects as Allodial, the superior, who divests himself of the fee, can have no other interest in it than the superiority and casualties inherent to such manner of holding, or any other claim that he has expressly reserved to himself. Wherefore, if the superior has not secured himself, by a clause of return, in such event, he can pretend no more, than to be supplied with a vassal, on the same terms that the former vassal held the lands of him; and the next lineal heirs, in default of those of the vassal's body, are called by the law. And it seems absurd, to make a difference between the case of a right "to one, and the heirs of his body," without proceeding farther, and a right "to one, and his heirs whatsoever;" for the superior is as much denuded of the fee, by disposing to one, and the heirs of his body, as if it was to his heirs whatsoever; since, in the one case, the dispositive may freely alien the property

^d Dir. verbis
(limitation
of fees) et
ibid. Stewart.

^e Reg. maj.
lib. 2. c. 52.

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property as much as in the other, which shews, that the superior can claim no interest in it in either case. And if there was no place for other heirs of the vassal than those of his body, the rule is, that *Quæ sunt nullius cedunt domino regi*, where heirs of the proprietor fail, the right is caduciary, and must fall to the king by his prerogative. And for what imaginable reason can a superior complain in this case, more than in that of bastardy? When the superior receives a bastard for his vassal, the right is "to him and his heirs whatsoever," which can only be "the heirs of his body," in default whereof, the right falls to the crown, even by our antient law^a. Must not the same rule then hold, when the fee is limited to the heirs of the vassal's body, by the tenor of the right, and those fail?

^a Reg. maj.
lib. 2. c. 52.

BUT it is a question of much greater moment, "whether, in a right provided to one, and his heirs-male of tailie or provision, without the ordinary termination, (failing those to heirs whatsoever) upon the failure of heirs-male, or other special heirs, the heirs whatsoever, or heirs at law shall succeed; or, if the right shall fall to the king, as *ultimus hæres*?" The lawiers above referred to, who, in the case of lands conveyed "to one, and the heirs of his body," on failure of such heirs, adjudge the estate to the superior, must, upon the same grounds, give it to him in this case, as being a limited fee. But, as I have shown, that the superior hath no interest in such case, so, I conceive, neither hath the crown upon the escheat of last heir; for, tho' it might seem, that a limitation to such certain heirs was a virtual exclusion of all others, yet it is more consonant to the rules of equity, and nature of the escheat of *ultimus hæres*, that, in this case, the heirs at law, or heirs whatsoever, should exclude the fisk; for the right can never fall as caduciary, thro' want of heirs, while lineal heirs exist. The fee comes to be in the same case, when the special heirs, to whom the right is provided, fail, as if it had been originally conceived without mention of them; and therefore heirs whatsoever, who were only excluded by the heirs-male, &c. must take the right in default of them; for the law casts the inheritance upon the heir, where no provision is made, setting him aside, or where such provision is at an end. And how can this be doubted? since it is certain, that a right taken absolutely to one, tho' it does not bear *his heirs and successors*, will notwithstanding devolve according to its nature; of heritable subjects upon the heir, and of moveables upon the executor; for heirs or executors, in default of the provision by the party, take place by the provision of law^b. Wherefore the case being, that where one conveys his lands to another, without mentioning his heirs, the same will belong to the dispoinee in absolute property, and descend to his heirs, tho' not mentioned, it must follow, that where the special heirs, to whom the fee is destined, fail, the heirs at law must take place. Heirs in lands are either by the provision of the party in the investiture, or by the act of the law; and of course, when the first fail, the other must take place, and for that reason, heirs of line are called Heirs at Law: and the learned Craig is of this opinion^c. Accordingly, in the brieve of service, the jury is directed to inquire, "if the deceased died last vest and seized, as of fee in the lands; and, "if the bearer of the brieve "is nearest and lawful heir to him therein," unless he claims the succession

107. This escheat takes no place, where the heirs specially mentioned in a deed, in which there is no termination upon heirs whatsoever, fail, if there be heirs of line still extant.

^b Feb. 2.
1667. la. Pil-
ton. Jan. 5.
1670. Innes.

^c Lib. 1. dieg.
10. § 25.

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cession by a special character as heir-male, or of entail, by the investiture; but otherwise there is no notice taken in the brieve, whether there are special heirs mentioned in the investiture or not, and consequently there is no occasion for the jury to return any thing about it in the service thereon.

108. An objection from a precedent to the contrary, answered.

It was indeed once found, that where the last termination of an estate was "to heirs-male whatsoever," upon failure of those, the estate fell to the king as *ultimus hæres*, in preference to the heirs of line^a. But, as that is only a single decision, and therefore can make no precedent, unless well founded, so, was it to be followed, (as it hath not hitherto been, and 'tis hoped never shall) it would make no general rule; for, where lands are destinated to *heirs-male whatsoever*, it may be thought thereby rendered what the feudists call *Feudum masculinum*, a masculine feude, in which only males, that connect their propinquity by males, and none other can succeed^b; but that is not the case, where the last termination "to heirs whatsoever" is only omitted. But indeed, with great submission, I conceive, that notwithstanding the above single decision, the law is, that, even where the right is taken "to heirs-male whatsoever," the lineal heirs, in default of such, will take place, as called by the law, for the reasons above mentioned.

^a Fount. July 25. 1688. Somerville.

^b Lib. 1. feud. tit. 8. lib. 2. tit. 11.

109. The escheat of *ultimus hæres* hath received no alteration by the statute, 7 Annæ.

It is the law of England, that where an estate descends to a person, after he is attainted of high treason, it escheats to the lord of whom it is holden, *Propter defectum hæredis*^c. Wherefore, since the act of queen Anne makes the laws of England, relating to high treason, our law, it may be doubted, what shall become of such estate at present. I conceive that, in this case, tho' the estate cannot fall under the party's forfeiture for high treason, even where the lands were holden of the crown, the same not having been in him at the time of the attainder, so as to be thereby carried to the crown; yet the king having the same privilege, as to the escheat of *ultimus hæres*, that he had before that statute, it must belong to his majesty; because the only reason for giving the estate to the superior in England, being the defect or want of an heir, it must go for that very reason to the crown with us, since it was not the intent of the statute of queen Anne to abate the royal prerogative in any respect. And it might as well be pretended, that the escheat of last heir should, in every case, belong to the superior with us, for such is the law of England^d; but, to be sure, such alteration in our law was not intended. Such estate falls to the superior, as last heir, by the English law. The case is thus put by the lord Coke: "The father is seised of lands in fee, holden of J. S. the son is attainted of high treason, the father thereafter dieth, the lands shall escheat to J. S. *Propter defectum sanguinis*: for that the father dieth without heirs, and the king cannot have the lands, because the son never had any thing to forfeit^e." But the consequence, according to the maxim of our law, above recited, is, that the estate must fall to the king. Indeed it cannot be confiscated by the attainder of the son, for the reason assigned by lord Coke; but it must with us escheat to the king as last heir, as in every other case where there is no proper heir.

^c Coke 1. inst. 13.

^d Littl. sect. 14. et ibid. Coke.

^e Coke 1. inst. 13.

Observations

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Observations on the Law of England, in relation to the Premises.

IN the law of England, forfeiture and confiscation are synonymous terms. Forfeiture, according to lord Coke, comes from *foris-facere*, i. e. *extra legem vel consuetudinem facere*, to do a thing against or without law or custom; and confiscation, from *fiscus*, the hamper wherein the Roman Emperors kept their treasure, and, by a figure, is taken for the treasure itself^a. We call forfeiture of moveables Single Escheat, which falls to the king; in contradistinction to the Liferent-escheat, that belongs to the superior; and generally apply the term Forfeiture to that of lands, and all one's effects to the king, by his attainder of high treason.

1. The terms, forfeiture and confiscation, equipollent.

^a Coke 1. inst. 59. 3. inst. 227.

FORFEITURE of goods and chattels is either of such as must appear or be found of record, and therefore those cannot be claimed by prescription, as the goods of felons, persons outlawed, fugitives, deodands, &c. and all other forfeitures which must be found of record. Other forfeitures need not appear or be found of record, as treasure trove, goods waved, wreck, &c. and these may be gained by prescription^b. I have spoken of those escheats of moveables with us already in their proper places^c.

2. Forfeiture of chattels, either of such as must be found of record; or of such as need not be found.

^b Coke 3. inst. 227. ^c B. 1. tit. 8. b. 2. § 8, &c.

BEFORE indictment, the goods, or other things of any offender, cannot be searched, inventared, or in any sort seized; nor can they after indictment be seized and removed, or taken away before conviction or attainder, but may be inventared only, and, during the imprisonment and prosecution, the party ought to be maintained upon his own effects^d. The offender's goods and chattels shall be forfeited from the time of the conviction, where it is upon an appeal or indictment; but the forfeiture of lands takes place from the time of the crime committed. The party may in the mean while, before conviction, sell his goods *bona fide*, whether chattels real or personal, for his maintenance; but if one, after the crime committed, to prevent forfeiture, make a gift of all his goods, and afterwards is attainted or outlawed, they are forfeited^e.

3. How far the effects of an offender can be inter-meddled with before conviction or attainder; to what time have these a respect, either as to goods or lands.

^d Coke ibid.

^e 3 Eliz. c. 5. Coke 8. rep. 171.

No man could be outlawed in England of old but for felony, and of this outlawry what is said in the old law books must be understood, *viz.* that one outlawed might be put to death by any man, as a wolf, that baneful beast; he was therefore said *gerere lupinum caput*, to have a wolf's head^f. But in the reign of Edward III. it was resolved by the judges, for avoiding inhumanity, that it should not be lawful for any man, but the sheriff only, (having lawful warrant therefor) to put to death any man outlawed, tho' for felony; and that, if he did, he should undergo such punishment as if he had killed any other man, and so the law continued ever since. Thereafter process of outlawry was ordained by divers statutes, in most of common and civil actions^g.

4. For what causes could outlawry of old proceed; the consequences of it; and on what grounds thereafter

^f Fleta, l. 1. c. 17. Mir. c. 4.

^g Coke 1. inst. 128.

By outlawry, one is disabled to sue or have the benefit of the law, being put out of the law, as the term imports; and if a man is outlawed at the suit of one man, all men shall take the benefit of his personal disability. It may be reversed, 1. by plea or motion, to inform the court of some fault in the proceedings: 2. by the king's

5. The consequences of an outlawry at present; how may it be taken off.

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pardon: 3. by writ of error. If, pending the action, the plaintiff, after the plea of outlawry pleaded against him, procure a pardon, which restores him to the law, the defendant shall answer ^a. Almost any objection will serve, upon a writ of error, to restore the party against an outlawry, for non-appearance in a civil action. The chief effect of outlawry is, that one outlawed, at the suit of another, in a civil cause, shall forfeit his goods and chattels to the king, whether real, as a term for years, or personal, as goods not fixt to the freehold, debts due by specialty, profits of his lands, as rents, corn, &c. but not the land itself ^b.

^a Coke ibid.

^b Finch, 351.
5 Edw. III.
c. 12.

6. What deeds good after outlawry, before inquisition found for the king.

As upon an outlawry in a personal action, so likewise upon an information for a misdemeanour, one forfeits not only his goods and chattels, but likewise the profits of his lands to the king, but not the lands, as above: however, a feoffment, lease, or other estate made *bona fide*, and, upon a good consideration, before inquisition found for the king, will prevent the king's title; but if such is made after inquisition, the same is void, and will not take away the king's title ^c. The case is the same where such deeds are made after the time at which the lands are vested by statute in his majesty, without any office or inquisition, which often happens, as shall be observed immediately.

^c Vin. (outlawry) p. 323.

7. The intent of office or inquisition; it is either office intitling, or office of instruction.

OFFICE or inquisition was devised by the law, for an authentic means to bring the king to lands by solemn matter of record; and for the safety of the subjects, that the officers of the king might not seize lands upon surmises without record. It is either office intitling, as in the case of lands purchased by an alien; or office of Instruction, *viz.* when the estate of the lands is lawfully in the king before, but the particularity does not appear of record, as in attainder or outlawry ^d. But frequently such inquisition is superseded by a statute, vesting the estates of persons attainted in the king, on a certain day, as was done in relation to those attainted for the rebellion 1715 ^e; and the same course was followed in respect to persons attainted for the late rebellion ^f. In place of this we have declarators of escheat before the court of session, and of any other casualty falling to the crown, as bastardy, &c.

^d Vin. (office, &c.) p. 79.

^e 1 Geo. I. c. 20.

^f 20 Geo. II. c. 41.

8. Outlawry infers disability to sue, but not to defend.

THO' an outlawry infers a disability to sue, it does not to defend; for one outlawed shall be put to answer in any action against him, because it is to his prejudice; but, in an action brought by him, he shall not be answered, the same being to his benefit ^g. By our law, one denounced rebel, (as we call an outlaw) can neither sue nor defend, as not having *personam standi in judicio*; but, in order to defend in any action, he will be relaxed of course.

^g Vin. (outlawry) p. 374, &c.

9. No pardon of outlawry can be granted after judgment in a civil action, till the party be satisfied.

By special statute in England ^h, where the plaintiff recovers damages, and the defendant is thereupon outlawed, no pardon of outlawry shall be granted, except the chancellor is certified that the plaintiff is satisfied his damages; nor shall an outlawry after judgment be reversed, till the plaintiff have acknowledged satisfaction upon record, or the defendant brings the money into the court ⁱ.

^h 5 Edw. III. c. 12.

ⁱ Vin. ibid. p. 380.

IF

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IF a commission of bankruptcy is taken out against one who thereafter suffers himself to be outlawed, the outlawry shall not prejudice his creditors, the same being his own act, since by his default it proceeded^a.

^a Vin. (Law)
379.

10. Outlawry, after commission of bankruptcy, cannot prejudice the creditors.

UPON outlawry for treason or felony, the offender shall forfeit as much as if he had appeared, and judgment had been given against him, as long as the outlawry is in force: those that are in default till the exigent in treason, felony, or *petit larceny*, tho' they render themselves to justice, forfeit their chattels, for that is a Flight in law^b.

^b Coke 3.
inst. 52, 352.
Finch 352.

11. Outlawry for treason or felony equal to a judgment upon appearance.

WHEN one is outlawed for treason or felony, the law interprets his absence as a sufficient evidence of his guilt; and therefore, without requiring further proof or satisfaction, accounts him guilty of the fact, whereupon ensues corruption of blood, and forfeiture of his whole estate. But outlawry in lesser crimes, as trespass, battery, &c. or in personal actions, does not occasion the party to be looked upon as guilty of the fact; nor does it infer an entire forfeiture of his real estate, but only of his goods and chattels personal and real, and profits of his lands^c. However, even in those cases last recited, it is very penal in its consequences; for, besides the disability and pains already mentioned, he is thereby restrained of his liberty, since he may be imprisoned if he can be found^d.

^c Finch 351.

12. The difference between an outlawry for treason or felony, and that for lesser crimes, or in personal actions.

^d Bac. new
abr. (outlaw-
ry) 745.

THE forfeiture and penalties of outlawry being so severe, the law requires that, in all civil cases, and in every indictment, or appeal, for any crime under the degree of capital, there should be three *Capias* against him, awarded to the sheriff of the county where the action or prosecution is commenced, before the Exigent be awarded. But, after judgment, an exigent may be immediately awarded upon a *capias ad satisfaciendum*. The king is to satisfy the party his debt, at whose suit the outlawry was taken out; but this is said to be *de gratia*, and not *de jure*. Persons outlawed in any civil action may be an heir or a witness, and his wife shall have a dower, as likewise tho' she be waved^e.

^e Bac. ibid.
759, &c.

13. The procedure in order to outlawry; it is said to be *de gratia*, that the king satisfies the party his debt; an outlaw may be an heir or a witness.

AFTER an outlawry for treason or felony is reversed, the party shall be put to plead to the indictment, for that remains still good. The law is the same in civil cases; and therefore, if an outlawry in a personal action be reversed, the Original remains^f.

^f Bac. ibid.
777.

14. On reversal of the outlawry, the party shall be put instantly to plead.

If the king grant over the lands of a person outlawed for treason or felony, and afterwards the outlawry is reversed, the party may enter upon the patentee; and needs neither to sue or petition to the king, nor take out a *scire facias* against the patentee; and he shall be restored to all that has not been answered to the king: which, in all cases, hath been understood of the mean profits, and not as to the principal thing to which he shall be restored, tho' seized into the king's hands^g. By our law, one that is outlawed or denounced rebel, (as we call it) forfeited only his moveables, whether in a criminal or civil cause, and his liferent-estate to the superior, if he remained year and day under it; and now both single and liferent-estate

^g Bac. ibid.
778.

15. What if an outlawry for treason or felony be reversed, after the king has made a grant of the lands.

estate

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Escheat is taken away in civil cases, by the late act ^a. But outlawry ^a 20 Geo. II. in high treason has the same effect here as in England.

16. An executor or administrator not disabled by outlawry to sue. A woman waved. No infant under 12 years, nor a peer, in civil cases, can be outlawed.
17. How far denunciation can be served against such person in Scotland.

AN executor or administrator shall not be disabled by outlawry; for he sues *en autre droit*, in the right of another, *viz.* the testator, or intestate. A woman cannot properly be said to be outlawed, but *Waved*, as one left out, and not regarded by the law; because women are not sworn at Leets and Turns to bear allegiance to the king: and, for the same reason, an infant under 12 years of age cannot be outlawed. A peer cannot be outlawed in civil cases, by reason of his dignity ^b.

^b Coke 1. inst. 112, 113.

BY our law, an executor, or a single woman, might have been denounced to the horn, whereby they would have incurred disability, and their escheat would have fallen. But as to a married woman it could have no effect as to escheat; because the goods which could have fallen under escheat are the husband's; and the denunciation of a minor, under the age of pupillarity, could have no effect. As to peers, they might have been denounced even in civil cases; but, by the union, they have all the privileges of English peers, except as to their sitting in the house of peers, otherwise than as they are elected by our peers. And whether that would have saved them from the effect of a denunciation, is of no moment to inquire now, as to the case of escheats, since escheats, upon denunciations in civil cases, are taken away by the late act ^c. It may be doubted, if such denunciation can be served against our peers, in order to infer a disability to sue or defend, since such outlawry against a peer in England does not take place. But undoubtedly it may be used, in order to make the sums bear interest, and the stile ought to be varied, so as not to import the other effects, if those do not follow upon it.

^c 20 Geo. II. c. 50.

18. The forfeiture in high treason.

BY the law of England, (which is now become our law in cases of treason ^d), it is consequent upon, or implied in the judgment of high treason, that the delinquent shall not only suffer death, and his blood be corrupted; but likewise that he shall forfeit to the king all his lands, tenements and hereditaments, in fee-simple or fee-tail, holden or not holden of any other, which he had at the time of the treason committed; and his goods and chattels from the time of the conviction. But the rights of all others are saved in a most ample manner, by the clause in the statute, fully recited in the foregoing title ^e.

^d 7 Annæ.

^e 33 H. VIII. c. 26.

19. The wife's dower lost by the attainder of the husband for treason.

As to the Dower of wives, it is expressly provided, by statute in England, "That the wife, whose husband shall be attainted of any treason whatsoever, shall in nowise have dower of any of her husband's lands, tenements or hereditaments, who shall be attainted of high treason during such attainder ^f." And indeed since, by the attainder, the husband's whole lands are forfeited to the king, and immediately vested in his majesty, the dower or terce cannot take place; because, in such case, it being the third of the lands for life, in which the husband died seised, he that is attainted of high treason dies seised in none, and so there can be no dower or terce of them.

^f 5 and 6 Edw. VI. c. 11.

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BUT the wife's jointure constituted by feisin, and all other real incumbrances upon the lands of the person attainted of high treason, as well as leases granted by him, are within the foresaid saving clause.

20. But her jointure or life rent by investment is safe.

^a 25 Edw. III. c. 2.

^b Coke 3. inst. 12.

^c P. 1540. c. 69. l. 5. cod. ad l. jul. majest.

^d Coke ibid.

^e Danv. (descent) p. 555.

^f Coke 1. inst. 13.

THE act^a, which is the standard law for treason, expressly requires, that the party charged with the guilt of treason *Be attainted of open deed*, which necessarily implies, that he be proceeded against, and attainted by due course of law. And therefore, if the party is slain in open rebellion, or otherwise die before the attainder of treason, he forfeits nothing; because he is not attainted. This act altered that which before was taken for law in England^b. The same was likewise our law formerly, viz. that one after his death could be attainted of treason, upon calling his heir, in order to a forfeiture of his estate, and extinction of his memory, conform to the prescription of the civil law^c. However, by act of parliament, one may still be attainted after his death, of which there hath been instances^d.

IF a man hath two sons, and is after attainted of treason, they may be heir the one to the other, for the attainder corrupts the lineal blood only, and not the collateral; but it is otherwise as to sons born after the attainder, because they never had any inheritable blood in them. If the eldest son is attainted, and survive his father, he shall be an impediment to the next heir to have the land by descent from the father: 'tis otherwise, if the eldest son is an alien, and the younger naturalized, for then the younger shall inherit, the eldest son never having had any blood inheritable in him^e. There is no doubt, but our law is the same as to the first point, since cases of treason are regulated with us by the law of England. However, it may be a doubt, whether the younger son who was naturalized, can, by our forms, be served as nearest and lawful heir to any of his ancestors, while his elder brother is alive, tho' an alien. But, I conceive, the service of the second son would proceed, he being the only nearest Lawful heir, as if the eldest were naturally dead.

21. None regularly can be attainted after his death; it was otherwise of old, both in England and Scotland; but he may by act of parliament.

22. The lineal blood is only corrupted by an attainder of high treason, but not the collateral. The case of an eldest son attainted outliving his father, or if he is an alien.

WHERE one is seized of lands holden of a common person, or a subject, and his son is attainted of high treason or felony, if the father dies, living the son, the land, by the law of England, shall escheat to the lord, *Propter defectum sanguinis*, the son being incapable to succeed, by reason of the corruption of his blood; and the king cannot have the land, because the son never had any thing to forfeit^f. By our law, the lands of the father, in such case, being suffered to descend to the son, standing attainted of high treason, would fall to the king by the escheat of *ultimus hæres*, or last heir, as I have shown in the foregoing title.

23. When lands descend to one after he is attainted, they escheat to the lord of whom held.

ESCHEAT, in the law of England, properly is applied to the Case, where, by accident, the lands fall to the lord of whom they are holden, in which case the fee is escheated. This may happen two manner of ways; 1. Where the party is attainted of felony, and is either executed or outlawed for the same, for then, his blood being corrupted, he can have no heir. 2. For default of heirs of the vassal or tenant, as where he is a bastard, and so can have no collateral

24. In the case of attainder in felony, and where the party dies without heirs, the lands escheat to the lord. It is otherwise.

wife in Scotland.

heirs, or where none is extant that can shew such relation to him, as shall intitle him to inherit to the deceased tenant^a; and, in all these cases, the land escheats to the lord of whom it is holden. By our law, there is no corruption of blood in felony; and the lands, or other heritable rights of one attainted of it, must therefore descend to his next heirs; and there is nothing forfeited, except such moveables as fall under single escheat: and the escheats of bastardy and last heir always belong to the king.

^a Coke 1. inst. 13.

PARDONS by the king, or by act of parliament, must have the same effect in England as in Scotland; and having treated at large of the same in the foregoing title, I shall only here add a few remarks from cases ruled in the law of England.

25. A person restored by charter from the king, having children thereafter; how may they inherit.

As restitution of blood, in its true nature and extent, can only be by act of parliament; so, if a man attainted be pardoned by statute, his blood is totally restored, and he is inheritable to all his relations: but, if by charter from the king only, he may thenceforth purchase lands, but cannot inherit his former relations, for the king's charter cannot alter, or take away the right of others, or restore the relation that was lost. Upon this ground the children born before such pardon shall not inherit; but, if they fail, the children born after may inherit their father who was pardoned; for the pardon makes him capable, as well of new relations as new purchases^b.

^b Bac. new abr. (pardon) 810.

26. What if one, after a pardon for treason or felony, be called a traitor or felon.

A PARDON of treason or felony, by act of parliament, even after an attainder, so far clears the party from the infamy, and all other consequences of the crime, that he shall have an action upon the case for damages, against any one who shall afterwards call him *Traitor* or *Felon*; for the pardon makes him as it were a new man^c.

^c Bac. ibid. 809.

27. A pardon cannot divest any interest vested before in third persons, or in the king; what if granted before conviction.

No pardon shall divest any interest vested in third persons, and even granted after costs taxed, shall not avoid the costs; and, if the party appeal, and the superior court gives new costs, the same shall not be avoided by the pardon. But a pardon, prior to conviction, shall prevent all forfeiture of lands or goods, and every other consequence of the crime^d.

^d Bac. ibid. 810.

T I T. IV.

Succession in general, in Heritage and Moveables.

ESCHEATS of bastardy and last heir have only a resemblance of succession, but properly are not such, being only introduced by the law, as suppletory to it. We come therefore now to treat of succession in the proper sense.

SECTION I. *The Origin and Nature of Succession.*

1. The origin of succession, a desire of one to be represented, which the

SUCCESSION, in a general sense, imports the coming of one after another. Here it is "A transmission of rights from the dead to the living, either according to the express will of the deceased, or the will of the law, in order to represent him therein." The chief characteristic

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teristic of property is the power of disposal that one has of it, not only to take effect in his life, but also after his death. Therefore in those countries where succession takes no place, one can hardly call any thing his own. It is the natural wish of mankind, and consequently their presumed will, that they should have some to represent them. The desire of immortality is so deeply rooted in the human frame, that it extends even to one's name and memory, after his death, that the same may be preserved in his representatives. The law of this, and every civilized country, indulges this natural bent of the mind so far, that if the party has made no settlement of his estate, it calls those to his succession whom it presumes he would have named, if he had made any disposition of the same; first, those of his own body; and next, his other relations, according to their propinquity, as defined by the law, conform to certain rules.

law indulges according to his presumed wish.

BUT, as the rules of the legal succession are founded upon the general inclination of the country that establishes it, the law, in that respect, supposes, that it may be prevented by the proprietor's power of settling his succession according to his pleasure. Hence proceeded the maxim of the antient law of the Twelve Tables among the Romans, *Uti quisque legasset rei suæ, ita jus esto*. Wherefore, the express will of the proprietor is the first rule of succession.

2. The first rule of succession the express will of the proprietor.

BUT, if there appear no determination or settlement by the owner, his estate must go according to the common sentiments of nature, as they are declared by the law of the country, where the subjects are situated; for, that a rule might be fixed, the lineal heirs are made certain by the provision of law. And it is presumed to be the will of the proprietor, that his estate shall go to them, when he makes no contrary ordinance, but suffers his succession to descend to them, as the law directs. Wherefore the secondary rule in succession is, that it shall go to the next heirs at law, from the presumed will of the owner, failing his or his predecessors express determination. Hence, succession is either by the provision of the party, or provision of law.

3. The next rule of succession; the will of the law founded in the presumed will of the party.

BECAUSE feudal rights were constituted by the joint consent of superior and vassal, and all succession in heritage with us is founded in the feudal customs, therefore no heritable right can be settled by testament, which is entirely incompetent and void as to heritage. But one may, by dispositions, procuratories of resignation, or by bonds of tailie, make settlements in favour of any persons he pleases, under what conditions and burthens he thinks fit, such deeds being always executed while he is in *liege poustie*, i. e. when he has lawful power over his heritage. This is so called, in opposition to death-bed, at which time one cannot, in the judgment of our law, convey a land-estate. Tho' such deeds, after being duly executed, should not be completed in the granter's life, by resignation and infeftment thereon, or perhaps without proper clauses for that end; yet they will be effectual to compel the heir at law to enter to the lands, and depude in favour of the disponent. If the deed was in favour of the disponent himself, and after his decease to certain persons, as his heirs of tailie or provision, the heir at law may, by proper diligence,

4. No succession in heritage with us by testament; but the equivalent may be done by revokable deeds of the nature of these inter vivos.

at

at their instance, be compelled to denude in their favour, after they have made up a title to the deed of entail; and, on his default, the subjects will be adjudged to them by the proper court, in a suit for that purpose. This answers the end of testamentary dispositions, the fiar having it thus in his power to settle his succession at his pleasure; for he may retain the deed of settlement, in his own possession, till his death, provided always it contain a power to alter, or a reservation of his liferent, or a dispensation with the delivery. In all these cases it will be good, tho' undelivered to the party who is favoured with it. But otherwise it will be void, as wanting the finishing act, viz. the delivery; *Et nihil actum censetur, quamdiu aliquid agendum superest*, as the law speaks on the like occasion. The above qualities are requisite in a disposition of an estate to a certain person, and his heirs. But, if it is a deed of entail "in favour of the fiar himself, and the heirs " of his body, which failing to certain other heirs," it is good without delivery, or any of the above qualities; for such deed is not intended to be delivered, being in favour of the granter. And as to moveables, the proprietor may make a testament, and bequeath them therein, or by writings apart, except that one, by testament, cannot prejudice his wife of her share thereof, nor his children unforisfami- liated, of their legitim or portion natural, as shall afterwards appear.

5. The term Heir, in a strict sense, is applied to the successor in heritage, and executor to the successor in moveables.

As in default of heirs, by the provision of parties, who are termed Heirs of Tailie and Provision, the heirs of line, or by provision of law, succeed in heritage: so in moveables, failing an executor nominate, or testamentary, there is place for an executor-dative, *i. e.* given by the commissars by provision of law. Tho' the word *Heir* is a general term, applicable likewise to an executor, who is *hæres in mobilibus*, heir in moveable subjects; yet it properly denotes the successors in immoveables, and other heritable rights, as does that of Executors the successors in moveables. The succession in heritage differs widely from that of moveables, as will appear from the following general observations, and more particularly from the subsequent titles, which treat of each severally.

6. To what rights, heritable or moveable, does the heir at law succeed.

THE heir alone succeeds in all immoveable subjects, and in those that are heritable, either by a clause for infeftment, or otherwise. And it is a rule in our law, that all heritable rights descend to heirs, whether they are mentioned in the deed or not^a. This holds even in rights of the strictest kind, as tacks and reversions^b: the reason is plain; for being heritable of their own nature, they are cast upon the heir by act of the law, so that the maxim in the civil law, *Qui providet sibi, providet hæredibus suis*, One who provides a right to himself, is understood to provide it likewise to his heirs, holds strongly with us. Indeed, if either from the nature of the right, as in commissions, tho' concerning lands, or conception of the deed, they are personal, as where a reversion bears "the lands to be redeemable by the "party, during his life," or the like, the same cannot descend to heirs. The heir has likewise sometimes right to things moveable of their own nature, as personal bonds heritable by a seclusion of executors. Thus likewise the heir at law has right to the heirship moveable, which is the best of each kind of moveables, or *ipsa corpora* of such things whereout heirship is due; if he is the heir of one that was infeft

^aHadding- ton. Feb. 22. 1610. heirs of Robertson. ^bJan. 9. 1662. Earl Murray. Nov. 1750. Wat- son.

infest in lands, houses, tithes or annualrent, termed *Baron*, tho' perhaps he has otherwise none of the privileges of a baron; or heir of a prelate, who is every beneficed clergymen; or of a trading burges at his death. The Best is that which the heir thinks so. It is most commonly a single thing; but sometimes it goes by pairs, as a yoke of oxen; and sometimes by dozens, as a dozen of spoons, if there are so many, otherwise it is but one: and if the heirship moveable is pledged, the executor must relieve it. The executor carries all other moveables, whether things or rights: of heritable and moveable rights I have discoursed in another place^a.

^a B. 2. tit. 1. sect. 4.

Tho' the successor in heritage is quite distinct from the executor in moveables, yet both are subject to the debts of the ancestor, in the option of the creditors. But the executor is only liable to the extent of the effects, conform to the inventories in the confirmation; whereas the heir, unless he serve *cum beneficio*, or upon inventory, and in some cases after mentioned, is liable universally. However, the heir has relief from the executor of the moveable debts, and if the nearest of kin, that might be executor, abstain, the heir may confirm himself executor creditor for such relief: and the executor has relief against the heir of all heritable debts wherewith he is affected; for tho' the same person is frequently both heir and executor, if there are no other in the same degree of relation to the deceased; yet if more males, or males and females concur in the same degree, the eldest male is the heir, and the rest are executors. But if only females succeed, they are both co-heirs and executors by equal shares.

7. Both heir and executors subject to the creditors in their option, but not to the same extent; how far relief competent to the one against the other.

If a cautioner, in an heritable debt, pays it, and takes only a discharge of the debt, this is sufficient to found his relief against the principal debtor; but this relief is a simply moveable right, and so belongs to his executors; for the original debt becomes extinct by the payment, so far as concerns the creditor^b. But if the cautioner, on payment, take, in place of a discharge, an assignation to such heritable debt from the creditor, it subsists in his person, in the same manner as if a stranger had taken right to it, and so would fall to his heir.

8. How far the right of relief of an heritable debt, moveable or heritable.

^b July 10. 1628. Cant. Jan. 1736. Wilkie'son contra Balfour.

SECTION II. *Primogeniture, and the Right of Representation.*

IN succession to heritage (except where females, or their representatives, who are heirs-portioners, inherit) there is place for primogeniture, as was just hinted: thus, amongst sons, brothers, nephews, or other males in the same degree of relation, or their representatives, the eldest, by the right of primogeniture, excludes all the rest. This right had its rise from the nature of the feudal holdings, that the vassal might be more capable to serve the superior, by the whole and entire fee's descending to him. This rule of succession is received with us, for the standing of families, to which our law very much inclines, and on the antiquity whereof many are so vain as to value themselves. The right of primogeniture was altogether unknown amongst the Romans, and not much respected by the Jews, being limited to a double portion, and taking no place in collaterals^c. We even make some distinction in succession of females, in favour of the eldest heir-portioner,

9. The right of primogeniture, what; and how far it takes place in heritage or moveables.

^c Deut. xxi. 17.

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portioner, allowing her a *Præcipuum*, (of which I shall afterwards speak ^a). But they are all, notwithstanding, heirs portioners.

^a Inf. tit. 5.

10. Right of primogeniture either legal or conventional.

THIS right of primogeniture is either by Act of the law, or Deed of the party : the first is in the case of lineal succession. One's eldest son succeeds to him in heritage as his heir at law ; but an absolute fiar of his estate may bar his eldest son from the succession at pleasure, with the same freedom as he may an extraneous heir. The second case is, where one limits his estate to himself, and his eldest son of a marriage, when perhaps he has sons of a former marriage ; if this is by a voluntary deed, to which he was under no civil obligation, he may likewise alter it as he sees proper. But if it is done in a contract of marriage, he cannot regularly disappoint the heir of the marriage by a gratuitous deed ; for that were to counter the faith of the contract. However, upon extraordinary provocations, and offensive behaviour on the part of such heir, he may be disinherited, and another child of the same marriage preferred to the succession ^b.

^b Hume decif. 50.

11. What if two sons are born at one birth, and it cannot be proved which was brought forth first.

IN case two sons are born at one birth, and it cannot be proved which of them was first brought forth, the question is, How the estate shall go ? It would seem most probable, that, since the primogeniture, that would give the privilege to the one over the other, cannot be proved, they must be conjoined in the succession. But how the matter could be expedited in our forms may be a doubt, since the brieve of Mortancestry is always in favour of one " as nearest and lawful heir ;" or if it be to more, in favour of them as heirs-portioners, or of provision ; which cannot take place but where females, or their issue succeed, or where one had taken lands to himself, and all his children of such marriage, who thereby become heirs-portioners of provision therein. It behoved, I conceive, to be by a declarator, finding them both equally intitled to the succession, and, pursuant thereto, a warrant from the court of session, to the director of the chancery, to issue out a brieve to the same purpose, for serving them joint-heirs. This case puzzled the doctors very much ; and the learned Tiraquil relates, at great length, twelve several opinions on it, and their reasons, and at last he accedes to the above determination, That they should be conjoined^c. This resolution may serve as to estates in fee-simple, where a division frequently occurs, and always may. But, in succession to indivisible rights, as to kingdoms or titles of dignity, and to estates under a strict entail, which are either indivisible of their own nature, or by the tenor of the settlement, the difficulty is greater, and may seem inextricable. The learned Voet prefers him who is in possession, for that the other cannot evict from him, but upon a proof that he is the first-born, which is supposed cannot be done, and so he must succumb ; but that, if none of them is in possession, it must be determined by lot ^d.

^c Tiraqu. de jure primog. quæst. 17.

^d Voet. digref. de feud. § 81.

12. The right of representation ; it takes only place in heritage.

THERE is another difference arising from the privilege of primogeniture, between the succession in heritage and that of moveables ; That in heritage, by the benefit of Representation, one will succeed, tho' remoter in degree, if descended of one who had right to succeed : thus, a grandchild, even a daughter of an eldest son deceased, excludes all her father's brothers in the succession to the grandfather, tho' males,

TIT. IV. A Parallel between Succession, &c. 293

males, and nigher in degree of relation; because, by the right of representation, she comes into her father's place, who would have excluded them; and if he leaves more daughters, they succeed as heirs-portioners to their grandfather.

AT the same time, tho' this be termed a Representation, yet the grandchild, for example, in the case of a succession to the grandfather devolving to him, his father having predeceased, does not represent his deceased father in his debts, to which he is nowise liable, by coming into his place; but only represents him in his propinquity to the predecessor, to whom the succession is claimed.

13. The right of representation is only as to propinquity, and not in order to subject the party to debts.

THIS right of representation is much controverted among the doctors, even as to those countries where the right of primogeniture obtains; and there was a famous instance to the contrary in France, viz. Ludovicus Pius, second son to Charles the Great, succeeded in preference to Bernard, son of Pepin, who was the eldest son of the emperor, but predeceased his father^a. And the same was of old doubted in our law^b. However, such right became our established law, some ages since, not only in succession to the crown, but likewise among subjects in all heritage. It is founded in the patriarchal law^c, established by the civil law^d, and received in the feudal customs of the Lombards^e. But in moveables there is no representation; for the next in degree in life excludes the children of the deceased from all interest therein, with an exception, in favour of brothers or sisters children, by the whole blood, as after mentioned.

14. The right of old doubted with us; how founded, and at last settled.

^a Tiraqu. de jure primog. quest. 40.
^b Reg. maj. l. 2. c. 33.
^c Gen. xi. xxxi. xiii. 8.
^d Novel. 118. c. 3.
^e Feud. lib. 1. tit. 7.

FROM the same Fountain another rule is derived to us, viz. That, in heritable succession, males, and their issue, always exclude females in the same degree, actually by propinquity, or by operation of the law by the right of representation. This privilege of males, in the succession to a land estate, so far held by the written feudal law, that a right taken to *Heirs whatsoever*, would only go to heirs-male; and unless the right was expressly taken to females, in default of males, females, or their descendants, could never succeed to it^f. But with us, a destination of lands, to *Heirs whatsoever*, is understood to comprehend females, in default of males of the same line, and their issue: thus, failing sons, and their issue male and female, daughters succeed in heritage, which was our antient law^g, as at this day. This shews that the feudal usages of the Lombards never took place with us. In moveables, the succession goes to the next of kin, without distinction, whether male or female, as was just observed.

15. In heritage, males exclude females in the same line of succession; but, in moveables, all in the same degree succeed alike; to whom do rights taken to heirs whatsoever fall.

^f L. 1. feud. tit. 13. jun. l. 2. tit. 11.

^g Reg. maj. l. 2. c. 25.

SECTION III. A Parallel between Succession in Heritage, and Moveables.

IN the line of ascendants and descendants, all are whole blood. And therefore children, tho' of different mothers, succeed equally to their common father in moveables. But, in the line of collaterals, persons may be related, either by the whole blood or half blood; the first is, where they have the same father and mother, who are called Brothers or Sisters-German, or when, in remoter degrees, they are descended of one common stock: thus, they are relations by the whole blood, whose fathers were brothers-german, procreated of the same

16. In both heritage and moveables, the whole blood excludes the half blood; how this understood.

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same father and mother, and are termed Coufins-German. But they are related by half blood only, who have the same father, but different mothers; or, in remoter degrees, whose fathers or grandfathers were sprung of the same father, but of different mothers; and then they are termed Brothers or Coufins-Confanguinian. Persons that have the same mother, but different fathers, are likewise related by half blood, and are called Brothers or Coufins-Uterine, as I took notice elsewhere ^a.

^a B. 1. tit. 5.
sect. 2. § 40.

17. A brother-confanguinian, tho' related only by the half blood, excludes the father and relations, by the whole blood thro' him.

IT is a rule, both in heritage and moveables, That the whole blood excludes the half blood in the same line of succession. Thus, a sister-german, and her issue, will exclude brothers-confanguinian; but as the line of descendants is preferable with us to that of ascendants, therefore a brother-confanguinian, failing brothers and sisters-german, and their issue, will be preferred in the succession, whether of heritage or moveables, to the father or his brothers-german; for the father never succeeds to his child, while he has any other children, or their issue.

18. Brothers or sisters considered as descendants, and therefore preferable to the lineal ascendant line, and much more the collateral.

HERE it must be observed, that, in a question about succession to a brother or sister, either in heritables or moveables, brothers and sisters, and their issue, are always considered as descendants, in competition with the father or other ascendants, and collaterals by them, and are preferable; for tho' brothers and sisters are truly collateral only to the deceased, yet, being descended of the same father, and preferable to him in the succession, they must likewise be to his brothers and sisters, who are intitled to the succession only by their relation to the deceased, viz. thro' him the father.

19. The mother, and the relations on the part of the mother, never succeed, either in heritage or moveables; but one succeeds to his mother and such relations as she could succeed to.

NOTWITHSTANDING there is so great regard had to persons having the same common father and mother, yet the mother herself, or any relations by her alone, as a brother uterine, can never succeed, even tho' the estate proceeded from the mother. Hence put the case, The son, who succeeds to his mother, dies leaving a brother uterine, and another confanguinian, the brother uterine will not succeed either in heritage or moveables, but the brother confanguinian; whereby the mother's succession shall go to mere strangers: for we observe not the rule followed in some other countries, and strongly recommended as our law by the learned Craig ^b, *Materna maternis, et paterna paternis, i. e.* That where one succeeds to his mother, and dies without issue, his blood-relations, on the part of his mother, and not those on the part of his father, shall inherit; and if one succeed to his father in lands, and die without issue, the land shall descend to his relations on the part of the father. But whatever doubt may have been in Sir Thomas Craig's time upon this point, there is not the least at present; so that the contrary of what that learned author contended for as our law is now established by inviolable custom. We consider in whose person the right last subsisted, and titles must be made up by his heirs. But this will not bar the relations, on the part of the mother, from succeeding in force of a provision: thus, if one provides his estate "to himself and his wife, and heirs of the marriage, which failing, to the heirs whatsoever of the wife," and an only child of the marriage succeeds, and dies without issue,

his

^b Craig lib.
2. dieg. 15.
§ 6. et 17.
§ 9.

his brother uterine, or other heir of line of his mother, will succeed to him as heir of provision; but, without such provision, the lands would escheat to the king, on default of heirs on the part of the father, and never descend to the mother or the relations by her^a. At the same time, one succeeds to his mother, and all her relations on the father's side, to whom she herself could succeed; because he is related to them by his mother and her father. Thus, one succeeds to his mother's brothers and sisters-german or consanguinian, because they had one common father; but not to her brothers or sisters uterine. Thus, likewise, one succeeds to his grandfather, or grandmother, by his mother, or to their relations on the father side, in the same manner as his mother would. But such grandfather or grandmother, and their relations, are not intitled to succeed to the grand-child, being only related to him by his mother, who herself could not succeed to her son.

^aFeb. 5. 1663.
Lennox.
Fount. Feb.
20. 1696.
Alexander.

THIS seems unequal, for that the succession ought to be reciprocal; and it may seem hard to exclude a mother from succeeding to her own child: but it was the primitive law of the Romans, by the Twelve Tables, afterwards rectified by supervening laws^b. However, we observe the antient law in this respect, notwithstanding its apparent hardship, in order to preserve estates in the father's family. I find that, of old with us, relations on the part of the mother did succeed^c; but which is antiquated by inveterate custom to the contrary, declared by the above precedents.

^bTit. instit.
de Tertull.
Sct^o.

^cReg. maj.
lib. 2. c. 25.
§ 5.

20. It is after the example of the law of the 12 tables, that the mother, or relations by her, succeed not: it was otherwise by our old law.

THERE is this farther difference between succession in heritage and moveables, that, in the succession of brothers to heritable subjects, the immediate younger brother to the deceased brother or sister is heir of line, in exclusion of the eldest and all other brothers, and the immediate elder brother is heir of conquest. And failing an immediate younger brother, and his issue, the immediate elder, and his issue, is both heir of line and of conquest; and failing an elder brother, the immediate younger. This rule is of old standing with us^d. Conquest that falls to the heir of conquest, is all heritable rights whereupon infeftment did or might follow, acquired by the deceased upon singular titles, *i. e.* to which he did not succeed as heir *Præceptione hereditatis*, or otherwise. All other rights, *viz.* such as had descended to the deceased, as heir of line, conquest or provision, to any of his predecessors; and heritable rights, tho' acquired by him, of such kind, that infeftment could not follow thereon, as tacks, bonds only heritable by secluding executors, as likewise heirship moveable, fall to the heir of line. Reversions fall to the heir of line, or of conquest, as the lands to which they relate are heritage or conquest^e. This distinction holds not in the succession of sisters^f.

^dQuon. attach. c. 88.
97. stat. Rob.
III. c. 3.

^eJuly 7.
1675. Robertson. June
23. 1663.
Ferguson.
Dir. decis.
295.
^fHume decis.
3.

21. In the succession of brothers to heritage, who heir of line, and who heir of conquest; no distinction in the succession of sisters.

ONE must be served Nearest and lawful heir to the deceased, by an inquest upon oath, and therefore only the next by blood or representation can be served; so that, if he should be absent, or not enter to the succession, no other can be admitted while he is in life. But his or his ancestor's creditors may affect and carry off the estate, by obtaining the same to be adjudged, in payment of their debts, as hath been already related^g. And in moveables, if any one that is

22. The nearest heir can only serve; the case is otherwise in moveables.

^gSupra tit. 2.
sect. 3.

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remoter in propinquity, on the father's side; to the deceased, shall be confirmed executor, as nearest of kin to him, the confirmation is void, if the next of kin insist to have it set aside; but otherwise, he is answerable to those having the preferable interest, as well as to the creditors, to which purpose he finds caution at his confirmation. But, if one of the nearest of kin confirm as such, the confirmation will not be voided at the suit of the rest, for he will only be accountable to them for their shares.

23. Exheredation, or renunciation by the next heir, does not exclude him; the successorium edictum takes no place with us.

It is to be observed, that no Exheredation of the next heir by the deceased, or renunciation by the heir himself can exclude him, and make way for the remoter^a. But still the next heir may serve himself, notwithstanding, nearest lawful heir; and the remoter cannot, even tho' the next heir should totally abstain, which might be inconvenient to creditors, and destructive to policy; but this is prevented by the foresaid remedy, allowing the creditors to affect the estate. The case was the same by the strict rules of the old civil law. But the Roman Pretor removed the foresaid inconveniency, by allowing to the remoter heir access to the inheritance, under the title of *Bonorum possessio*, which in effect carried the succession. This was called *Successorium edictum*^b, and was thereafter laid down as the rule of succession by the emperors^c; which can take no place with us, for the reason above assigned.

^a Haddington. Dec. 1. 1609. Dalgliegh.

^b Tit. ff. de success. edict. ^c L. 1. c. cod. tit. § 7. inst. de legit. ager. rat. success.

24. One's calling his nearest heirs whatsoever, in exclusion of one of them, virtually debars each one.

If one destinate his estate to heirs whatsoever, "excluding and debarring one of his next heirs," the other heirs at law will succeed as tacitly heirs of provision, and the person excluded will stand debarr'd from the succession, not by virtue of any exheredation, but because the deceased had virtually instituted the other heirs. This was lately found in the settlement of Sir John Lesly's estate, whereby certain of his daughters were specially substituted, and, failing of them, he provided his estate to his heirs whatsoever, excluding and debarring one of his daughters by name; and he having another daughter not named at all in the settlement, she, after failure of the daughters specially substituted, was found virtually called, as heir whatsoever, in exclusion of the daughter debarred.

25. In moveables, any of the nearest of kin renouncing, makes way for the rest in the same degree.

BUT in moveables, if any of the nearest of kin have either expressly or tacitly renounced their right, it accrues to others of the same degree, who are likewise equally near of kin; and, in default of them, the succession regularly will devolve on those who renounced, in exclusion of the remoter.

26. What difference in the succession to heritage and moveables, as to persons residing and dying abroad.

THERE is this considerable difference, by the laws of most nations, between the succession to heritage and that to moveables, viz. that in heritage or lands, and rights touching the same, the law of the place where the subjects are situated determines the same. But, as to moveables, the rule is, "That those succeed therein who are intitled by the law of the place where the owner or creditor resided at his death" tho' the subjects lie, or the debtors live in another country, where the rule of succession is different^d. As to the first, which regards the succession in heritable subjects, it is inviolably followed with us. But, as to the succession to moveables, it would seem that the law of Scot-

^d Voet. ad sc^m Tertulian, § 34.

land must be the rule, tho' the owner or creditor lived and died in another country, where the course of succession varies: for, since a nuncupative testament in England was not sustained here, in prejudice of the nearest of kin, intitled by our law, neither can the law of England, or any other country affect the succession, as to things lying here, or demands that may be made before our courts, of claims that belonged to foreigners deceased^a; but titles must be made up to the same conform to our law. And this is likewise the opinion of divers learned lawiers^b. And which seems unavoidable, for the succession both in heritage and moveables depends on the law of the country where it is claimed, insomuch, that if by that law no succession to the intestate were allowed, but that the whole effects should go to the heir, that country where they lay, or as to debts where the debtors lived would have the benefit, as is plain from the nature of the thing, and is given us, as the law of nations, by the learned Voet^c. And consequently the same law must determine what relations shall inherit, and what titles shall be made up thereto. Indeed, if a claim is made here, touching debts due to a foreigner deceased, the law of the place of his residence would be regarded. For example, one as nearest kinsman gets payment of a debt due to his predecessor, and, coming here, is sued by another, who claims an equal interest in the subjects, by the law of the place where the creditor lived and died, that law would be the rule for the decision of the case, for then no titles are requisite to be made up, conform to our law^d. I have spoken a little elsewhere on this point^e.

^a Jan. 19. 1665. Shaw.

^b Tiraq. de jure primog. quest. 49.

^c Ad tit. ff. de bonis damnat. § 7.

^d Falc. Nov. 28. 1744. Brown.

^e B. I. tit. I. § 63.

ALL females of the same line, failing males, succeed as heirs-portioners, and, as one heir, represent their ancestor; and, in case of the death of any of them, the eldest son of the deceased succeeds in the right of his mother by representation. But, in moveables, those of the same degree and line, whether male or female, succeed alike, as was above remarked. Nor do they succeed *in stirpes*, or in place of their parents, which only holds by the right of representation, but *in capita*, according to the number of persons in the same degree. So that, if nephews and nieces are executors to their uncle, they come in all equally in their own right, without regard to their parents; nor have the children of the deceased nephews or nieces any interest, because representation has no place in moveables.

IN propinquity, whence the right of succession arises, the lines and degrees must be considered. A line is "a series of persons, descended of the same parents or parent." It is either the right line of Ascendants and Descendants, called likewise the Direct Line, where the persons are related, as parents and children, &c. or Oblique, termed the Collateral Line, where the persons related are not descended the one of the other, but have a common parent, by whom they are related to one another, as brothers and sisters, &c. who are all either of the whole or half-blood, of whom, however, brothers and sisters, and their issue, are considered as in the line of descendants, as above. The degrees of propinquity are the several removes by new generations, so that every succeeding generation, whereby the child is farther distant from his father's relations than his father, is a degree, by the computation of degrees in the civil law^f. I have

27. Lines and degrees of propinquity, in order to succession.

^f Tit. ff. de grad. et aff.

largely

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largely spoken of lines and degrees elsewhere^a. As to degrees, ^aB. 1. tit. 5. the observation of them is only of use in the succession to moveables, ^{§ 37. 43.} which devolves to the nearest in degree; but not in the succession to heritage, where, on account of the right of representation, the distinction of degrees is not regarded. In the succession to moveables, we follow the above rule, both in the direct and collateral line, without regard to the computation of degrees in the collateral line, by the canon law, tho' vulgarly that manner of computing relations is used, as I remarked in the place before quoted.

SECTION IV. *The special Rules of Succession in Heritage and Moveables.*

28. The rules of succession, in both heritable and moveable rights.

FROM the observations hitherto made, it appears, that the lineal succession with us, in both heritables and moveables, is, 1. The descendants, in the remotest degree, exclude ascendants and collaterals. 2. That, brothers and sisters succeed next to descendants. 3. Failing those and their issue lawful, the immediate ascendant succeeds. 4. The immediate ascendant's collaterals. Thus, the father succeeds to his child, failing the child's descendants, and his brothers and sisters by the father, and their issue; and next to the father, his brothers and sisters, the deceased's uncles and aunts, and their issue lawful; and failing those, the grandfather by the father, and after him the grandfather's brothers and sisters, and their issue succeed; and so backward to the most antient predecessors, the collaterals of the immediate progenitor, always barring the remoter predecessor, and his collaterals. This is founded upon the same reason that brothers and sisters exclude the father, *viz.* that it is presumed the right came from the father, and the same affection to continue to all his children. 5. That the whole blood always excludes the half-blood in the same line of succession. Thus, brothers and sisters-german, and their issue, exclude brothers consanguinian^b; but a brother consanguinian bars the father, or his brothers and sisters, tho' of the whole blood. 6. That the mother, or any relations by her, never succeed; so that there will be place for the king, as last heir, in preference to one's mother, brothers or sisters uterine, tho' children succeed to their mother, and such relations to whom she herself could succeed. Lastly, That there is no succession by affinity. Thus, the husband and wife never succeed to one another, and much less can the relations of the one succeed to the other, or his relations. The case was otherwise in the civil law, by which, failing blood-relations, the husband succeeded to the wife, and, on the contrary; but the relations of the one never succeeded to the other^c. And, if the wife survived, and was indigent, she succeeded to a certain proportion of the deceased's effects, by the law of the Novels, even tho' the deceased left children^d.

^b July 4. 1719. Gemmel.

^c Tit. cod. unde vir et uxor.

^d Nov. 117. c. 5.

29. The diversity between the succession in heritage, and that in moveables.

THE diversity between the law of succession in heritage, and that of moveables with us, is, 1. That, in heritage, males bar females in the same line of succession, but not otherwise. Thus, sons exclude daughters; brothers exclude sisters; but sisters-german or consanguinian bar the father, and the collaterals to him. 2. That in heritage, the right of primogeniture takes place among males; so that the eldest son and his issue excludes all the rest, and eldest brother the younger brothers,

brothers, with the foresaid distinction as to a middle brother, that the succession divides between the heir of line and heir of conquest. 3. That, in case of female succession in heritage, all of the same line, and the issue of the deceased, inherit equally: thus, all the daughters succeed alike as heirs-portioners, and all the sisters, first german, and next consanguinian. 4. That in heritage there is place for the right of representation; so that the great grandchild of the eldest son will exclude the second son; and among the children of heirs portioners, the eldest son succeeds in his mother's right, exclusive of the rest. But in moveables, as has been oft said, all of the same degree and quality, male and female, come in alike.

THE foresaid line of succession takes place, unless the rights are expressly provided to other heirs. This happens where one takes a "right to himself and his heirs-male;" for then the heir-male succeeds, tho' in a remoter degree, in exclusion of a nearer heir-female and her issue; and in this case the heir-male must connect his propinquity to the deceased by males. And the privilege of primogeniture and representation takes place here, as in all succession to heritage. An heir-male may be termed an heir of tailie; because the lineal succession is frequently thereby cut or set aside, viz. where the heir-male is not likewise the heir of line. But generally an heir of tailie is understood where one provides his estate to divers successive branches, limiting it "to one and the heirs-male of his body, which failing, another, " and the heirs-male of his body," and so on to such a series of heirs-substitute as the tailier thinks proper: when all the branches of the tailie fail, it becomes a fee-simple. Tho' heirs-male, and of tailie, are heirs of provision, yet more commonly heirs of provision are meant where there are not more branches; but the right is taken to one, and the heirs of such a marriage, and then they are likewise termed Heirs of the marriage.

30. Heirs-male, and of tailie; the lineal succession takes place in the branches of a tailie.

THE lineal succession in heritage takes likewise place amongst heirs of provision, so that the eldest son inherits lands provided to heirs of a marriage; but if it is a sum of money, it goes to all of them, male and female^a, as in moveables. It is otherwise if a sum of money, is provided to heirs-male of a marriage; for then the eldest son of the marriage succeeds as heir of provision to the whole; because, amongst males, the eldest always takes without division.

31. In a provision of lands to heirs of a marriage, the eldest son succeeds; of moveables, all the children.

^a Hume de-
cif. 95.

SECTION V. *The Law of Death-bed.*

THE law of death-bed is a considerable privilege of heirs. Persons on death-bed are easily imposed upon; therefore our law has wisely provided, that no free or gratuitous deed on death-bed can prejudice the heir^b. The law of death-bed was introduced with us upon the same principle as the *Querela inofficiosi testamenti* among the Romans. The party who makes the settlement in prejudice of his heir on death-bed, is holden incapable on account of the disease; in the same manner as one, without cause, disinheriting his children by his testament, was supposed *non compos* by the civil law, on account of his unnatural settlement^c. One is said to be on death-bed after he has contracted the disease whereof he dies; and, on that account,

32. The motives for introducing the law of death-bed; when is one deemed on death-bed in judgment of law.

^b Reg. maj.
lib. 2. c. 18.
§ 7. et seqq.

^c Tit. instit.
de inoff. test.
pr.

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of old, all deeds thereafter granted were voided, so far as concerned the affecting his heritage, tho' he survived perhaps some years, but died of the same disease^a. But, to remedy this inconveniency, a statute was made, whereby it is declared, that the deed shall not be deemed as granted on death-bed, if the granter survived the date of the deed 60 days, tho' he had contracted the disease before the deed was executed^b. Any disease, wound, or hurt, tho' not affecting the judgment, is here intended, if the party died of the same.

^a Feb. 7.
1671. Law-
rie. Jan. 9.
1642. Nicol.

^b P. 1696.
c. 4.

33. The case of one, under sentence of death, conveying his heritage.

A DEED by one under sentence of death is understood to be granted on death-bed^c. And indeed the learned Craig carries this matter so far, as that a conveyance of heritage by one, after he is sifted in judgment for a capital crime, shall, according to him, fall, if sentence condemnator follow; for that the party thereby becomes *servus pœnæ*^d. It is true, by the civil law, one under such condemnation became a slave bound to the punishment, and incapable to acquire either to himself or the public, and legacies bequeathed to him were void, and holden *pro non scriptis*^e; but that was the effect of slavery, which does not obtain with us, and therefore I can see no disability in such person to acquire and hold an estate, as I have observed in the foregoing title. But as to a conveyance by him, in prejudice of his heir, how far, if he outlive 60 days after such deed, the same shall be exempted from the law of death-bed, which, by the act 1696, holds in other cases, is a question. The above authority and precedent, being before this act, may seem to be of no weight in the case: however, by analogy from the law of death-bed, I should think that, unless a pardon be obtained, the deed should fall, as being by one that is not *sui juris*, has not the mastery of himself; for a person cannot be considered as having a freedom of acting who is condemned to a capital punishment. The act 1696 concerns only persons on sick-bed, who may recover; and it holds for a convalescence, the party's outliving 60 days after the deed, as the law does likewise his going to church or market unsupported, as after mentioned. But neither of these holds in the case of a judgment of death; the only convalescence, if I may use the term, can be a pardon, whereby the sentence is extinguished, till which the party must be considered always as on death-bed.

^c Marcus (summons) March 1683. Graham.

^d De feud. lib. 1. dieg. 12. § 37.

^e L. 17. ff. de pœnis.

34. The privilege of reducing deeds, on death-bed, competent to all heirs; even such as become heirs after the first heir's succession.

THE privilege of reducing deeds on death-bed is competent to heirs of all kinds, who would have succeeded in the subject if such deeds had not been granted, or whose right is burthened thereby: hence an heir of conquest or of provision may, on this head, reduce deeds to his prejudice, tho' granted in favour of the heir of line; because, as to the rights provided to such other heirs, the heir of line is an extraneous person^f. It is likewise competent to those who were not presumptive heirs at the time of granting the deed, or of the grantor's death, but to whom the right of succession afterwards opens, by the death of the nearer heirs; because, at the time of suing the action, they have the right of succeeding in the subject alienated, or burthened on death-bed to their prejudice. Nor does it alter the case that the immediate heir was not prejudiced by the deed^g, unless he possess the estate thereon, or ratify the deed; in which case all the subsequent heirs are barred from challenging the same, as is after

^f July 24. 1672. Porterfield. Hume decif. 32. id. decif. 72.

^g July 25. 1672. Gray. Hume decif. 33.

after observed. Nor is there any difference between an estate in lands, and that of any other heritable subjects; so that heirship moveable, bonds, only heritable by secluding executors, can as little be alienated or burthened on death-bed as a land estate^a; because the heir has as good title to the one as the other.

^a Hume decis. 53.

BUT one may, on death-bed and by testament, dispose of all his moveable estate to the greatest extent, (heirship moveable excepted) under the limitation, to be mentioned in its proper place, in favour of his wife and children, whose interest cannot be hurt by gratuitous deeds on death-bed, more than the heir's. In this case it is only in respect to one's nearest of kin, or executors, that he may freely dispose of his moveables on death-bed, and exclude their interest. But as to the heir, with respect to his relief of moveable debts from the executors, he is creditor upon it, and the same, in that view, cannot be affected by such gratuitous deeds on death-bed^b; because the heir is as much thereby prejudiced as if the heritage were directly affected; and one's effects, disposable by testament or on death-bed, can only be understood of what remains after deduction of debts, *Bona intelliguntur cujusque, quæ deducto ære alieno supersunt*^c.

^b July 22. 1707. Cowie.

^c L. 39. ff. de verb. signif.

35. What deeds reducible on death-bed.

DEEDS reducible on death-bed must not only be gratuitous, but likewise Free, *i.e.* such deeds to which the granter could not be compelled by action at law: hence if he was under a previous obligation, the deed, in consequence thereof, will subsist, tho' granted on death-bed. However, the natural obligation incumbent on parents to sustain their children, will not support provisions made to them against the law of death-bed, which is universal; since the father was not compellable by any civil action to grant them^d. But the case is otherwise, if he was under obligation, by his contract of marriage or otherwise, to provide the like sum in favour of the children^e.

^d July 1. 1677. Riddel. Hume decis. 4.
^e July 19. 1706. Edmonstoun. Jan. 18. 1709. Darling.

36. Children's provisions not good against the heir, if on death-bed.

HERITABLE securities may be granted by one upon death-bed to his creditors, so as to subsist in their favour, but not to prejudice the relief competent between the heir and executors. However, it would seem that one cannot dispoise his land-estate, tho' for valuable consideration, upon death-bed, that being presumed detrimental to the heir. Nor can he alter the destination of the same on death-bed from one heir in favour of another; for such deed were directly in prejudice of the heir formerly called^f.

^f July 30. 1635. Richardson. Jan. 18. 1709. Hay.

37. How far can one, upon death-bed, change the nature of his estate from heritable to moveable.

IF, in an action, a day is taken for one who is on death-bed, to depose upon the debt pursued for, and the term is circumduced against him for not deposing, the heir may reduce the decree on the head of death-bed. But if the party, at the time of litiscontestation, *viz.* when the day was taken for him to depose, was in *Liege poustie*, the heir will not be relieved, tho' he was holden as confest, by circumduction of the term against him when on death-bed^g. One is said to be in *liege poustie*, either before his contracting the disease of which he died, or after he was taken ill, if he outlives the granting of the deed 60 days, or thereafter convalesced in the judgment of law, as after mentioned; for then he had lawful power to dispoise or burthen his heritage.

^g Harcus (lectus) 1682. Nicolson.

38. What if one, upon death-bed, own a debt upon oath, or the term is then circumduced against him.

WHERE

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39. The recital of the consideration in a death-bed deed not credited.

WHERE the deed is granted on death-bed, the recital in it will not prove the preceeding obligation, or other onerous cause of the same, which therefore must be otherwise instructed; for, by the same facility that one is induced to grant the deed, he will be prevailed on to insert a false narrative in it. And, for the like reason, holograph deeds, viz. such as are wrote and signed by the party without witnesses, do not prove their dates in prejudice of the heir, but are presumed on death-bed; unless the creditor prove the date to have been prior to death-bed. But this extends not to foreign bills of exchange, which are regulated by the custom of nations^a. Of this matter I have discoursed farther in another place^b.

^a Feb. 1735. Kennedy.
^b B. i. tit. 13. § 20.

40. What if an heritable debt is paid, or made moveable on death-bed.

IF a debtor *bona fide* makes payment of an heritable debt to the creditor, who is on death-bed, it will be sustained. But, in this case, the heir of the creditor will have action against the executor for the money received. And, for the same reason, if a creditor, on death-bed, renders an heritable sum moveable by requisition, or charge, it will, notwithstanding, belong to the heir: at least the executor will be bound to make it good to him^c; because, in both cases, the heir would otherwise be plainly prejudiced by such death-bed deed.

^c July 22. 1707. Cowie.

41. The objection of death-bed, how excluded by convalescence, in going to church or market.

THE objection of death-bed is not only excluded by the granter of the deed his outliving 60 days, but likewise by his Convalescence after the date of the deed, as above hinted. The legal proof of convalescence is the party's going to the church the time of divine service, or of any other public meeting, civil or ecclesiastical, or to the market at market-times, and thence returning, unsupported^d. If this appears to have been done on purpose to validate the deed, the court of session will more strictly examine the circumstances as to Supportation, which, if proved, will exclude the defence of convalescence. Acts equivalent to going to church or market have always been sustained as a good defence against reduction on the head of death-bed; and sure, if one should go a long journey unsupported, or do other acts in public which import health, after the deed in question, it would be a sufficient proof of convalescence as to all legal effects^e. But private acts within doors, or even about one's dwelling-house, will not infer convalescence, or be deemed equivalent to going to church or market^f; because such acts would be proved by domestic witnesses, and perhaps accomplices in the contrivance, to validate the deed, who therefore are justly suspected. Whether one rides, or walks on foot to the church or market, does not alter the case, provided he was not supported. But where supportation is proved, the defence is entirely excluded, and the deed will be reduced on the head of death-bed. On the other hand, if the going to the church or market is proved, convalescence, in the judgment of law, is thence inferred, tho' the party continued still sickly to his death, and never actually recovered: unless undoubted symptoms of his disease, at the very time of performing such act for inferring convalescence, appeared^g.

^d Act of sed. Feb. 29. 1690.

^e Fount. 21. Feb. 1694. Tillieven. Hume (death-bed) 19. July 1736. Earl Roseberry.
^f Feb. 1. 1622. Robertson. June 28. 1671. creditors of Balmerino.

^g Fount. Dec. 5. 1711. Crawford. Stair, Feb. 26. 1669. Pagillos.

42. How does the heir's consent, or renouncing

WHETHER the heir's signing witness to the deed will bar him from reducing it, may be a question: but first, he may not know the contents; next, tho' he did, all he attests is the reality of the subscription,

scription, which, in a reduction upon the head of death-bed, one does not contravert. But his signing consenter to the deed, or ratifying it before or after the ancestor's death, will exclude all reduction at his instance^a, the privilege being introduced in his favour, which he thereby renounces. And all succeeding heirs are excluded by such deed of the immediate apparent heir; because thereby the deed in question is of the same force, as if it had not been granted on death-bed. And the action that was competent to him to reduce the deed being discharged, no subsequent heir can take it up.

the privilege operate against this reduction.

^a Dirl. decif. 40.

BUT any previous obligation by the heir, not to quarrel, on the head of death-bed, any deed that shall be granted by the predecessor, or his consenting that a disposition of the estate be granted on death-bed, will not exclude him from this action^b; because the law of death-bed cannot be dispensed with by the pactions of private parties, *Jus publicum privatorum pactis mutari non potest*^c, so that such obligation or consent is void. Nor will the heir's acceptance of part of the estate from his ancestor, "in full satisfaction of all he could claim "by his death," bar him from this action as to the residue, more than it could from succeeding to the deceased therein^d; for he is still apparent heir in it, and cannot be prejudiced by a death-bed deed, as to the same.

43. A previous consent to such disposition, not available; nor will the heir's accepting part of the estate, in full of his claim, bar him.

^b Decem. 4. 1733. Inglis contra Inglis. ^c L. 38. ff. de pactis.

^d Decem. 15. 1744. Irvine.

IF the heir renounce the privilege, by signing consenter to the deed, or ratifying it in the deceased's life, the heir's creditors are barred from reducing, even on the act 1621, the debtor not having made over, or past from any right to their prejudice, *Viventis nulla hæreditas*. But, otherwise the creditors in the heir's right are intitled to reduce; and, if the heir ratifies the deed after the succession opens to him, reduction is competent to his creditors on the above statute, and on the head of death-bed; in the same manner as if he had alienated the estate himself to their prejudice; for, by ratifying the death-bed deed, he does the equivalent. But the creditors of the deceased are not intitled to this action; for, if it falls not under the act 1621, it is *jus tertii* to them, no concern of theirs, whether their debtor was on death-bed or not, when he executed it; and, if it does, they may prosecute their action on that statute, or otherwise affect the subject on their own rights, as they see cause; for death-bed is a privilege competent to the heir only, or those in his right^e.

44. Are the creditors of the deceased, or of the heir, intitled to reduce on death-bed.

^e Dalrymple, June 24. 1714. creditors of Lindsay.

THE law of death-bed is peculiar to the heir; and therefore, if the disposition on death-bed is in his favour, and failing of him to extraneous substitutes, and he accepts, the remoter heir is for ever excluded, and the substitutes are preferable, as above. But, if the disponent does not homologate the right, or being an infant cannot accept, then, on failure of him, the next heir who was excluded is intitled to reduce it on the head of death-bed; for the deed is to his prejudice, the immediate heir, the disponent, having done nothing to confirm it.

45. If the immediate heir ratify the deed, the remoter excluded.

IF one's estate would fall to the king by the escheat of last heir, it may be excluded by the party's deed, tho' on death-bed; for the king, by his prerogative, in such case, only seizes the effects, as *bona vacantia*.

46. Is the king, as ultimus hæres, intitled to this action.

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vacantia, which they cannot be, while a conveyance of the same is extant : and it is *jus tertii* that it was granted on death-bed, the privilege to reduce it on that head being peculiar to the heir, in a proper sense, which the king by the escheat is not.

47. What is incumbent on the heir's creditors to intitle them to this action.

THE creditors of the heir cannot insist in this action, till they put themselves in the heir's place, by adjudging the estate alienated or burthened by the predecessor on death-bed: and, if such legal title be made up in the heir's time, they may prosecute the reduction after his death, but otherwise they have no title to intent or carry on the action^a. For, tho' the estate had not been disposed on death-bed in prejudice of the heir, yet, after his death, his creditors could not affect it; unless he had been infest therein as heir, or they had adjudged the same from him, as charged to enter heir in special thereto; or upon the act 1695, in case he had been three years in possession of the estate.

^a Feb. 18. 1676. Trotter.

48. In what cases may one on death-bed exercise a faculty to alter, contained in a disposition of heritage.

I HAVE, in another place^b, spoken of dispositions, containing faculties to alter or revoke them on death-bed: in these the rule is, That if they are to strangers, the faculty may be exercised on death-bed; because the right is granted with such quality, and the heir of the granter is excluded by the disposition, and not by the exercise of the faculty. But, if granted to the presumptive heir, he may reject the disposition, and reduce the exercise of the faculty, if done on death-bed, as being a device to elude the law of death-bed; unless the heir has accepted of the disposition, and possessed thereon; for then he is in the same case with extraneous disponees, and cannot bring under challenge the exercise of the faculty to his prejudice, tho' done on death-bed^c.

^b Sup. tit. 2.

49. How far, an heir reducing a second disposition in his favour on death-bed, will the former subsist.

ONE having executed a disposition of his estate in favour of his heir, and charged him with certain provisions to his other friends, with a power to alter, made a new disposition on death-bed in his favour, with additional burthens; the lords of session, in a reduction at the heir's instance, *ex capite lecti*, found him free of both, the second disposition having revoked the former by an express clause^d. But, if there had been no such clause in the death-bed disposition, I conceive the former would have subsisted, since the implied revocation, by executing the second deed, could not have effect, unless such deed, whence it is inferred, did subsist; and consequently, if it were reduced on the head of death-bed, the former behoved to take place.

^c Feb. 3. 1706. Bertram. June 22. 1670. Douglas.

^d June 12. 1748. Cunningham.

50. What if one acquire an estate in name of his apparent heir, with a faculty to alter.

IF one acquire an estate in the name of his apparent heir, with a faculty to himself to alter, and makes alterations on death-bed, whereby his presumptive heir is set aside, how shall the heir be redressed, for he cannot reject the original disposition, conveying the right to himself? The lords have found the heir, who was the original donee, intitled to reduce the exercise of the faculty on death-bed, as being a device, *Fraudem facere legi*, to elude the law of death-bed^e: but that can only hold, if the donee had not accepted; for, if he has owned the right, he must submit to the quality in it, and cannot challenge the exercise of the faculty.

^e Marcus (lectus) Nov. 24. 1687. Davidson. Fount. Jan. 23. 1688. Hepburn.

WHEN

^a June 22.
1670. Dou-
glas.

WHEN the disposition does not expressly mention a power to alter On death-bed, but only indefinitely reserves a power to alter, it may be doubted if it can be exercised on death-bed. This does not seem to be a fixed point; but, I humbly conceive, that without the words, (on Death-bed) or *Etiam in articulo mortis*, the faculty may be exerted on death-bed^a; because the law of death-bed is only in favour of the heir, and therefore a donee, under such faculty, cannot plead it; but if, by the disposition, one is only an heir of provision, such faculty cannot be exercised to his prejudice on death-bed, more than in the case of other heirs, as I formerly observed.

51. If one has a faculty to alter, can he do it on death-bed, unless so expressed.

REDUCTION upon the head of death-bed, is not only competent against the original donee, but likewise his singular successors, tho' for valuable consideration, or onerous causes; because death-bed is *Labes realis*, persons being then deemed in law incapable as to deeds affecting heritage.

52. This reduction competent against singular successors.

^b Fount. Nov.
22. 1698.
Cuming.
Nov. 26.
1674. Paton.

DEEDS of alienation of heritage being reduced on the head of death-bed, there is not competent to the donee any recourse upon the warrandice, either against the granter's heir or executor^b; because the reduction proceeds on the legal incapacity of the granter. But, if it is a gratuitous bond which is the subject of reduction, it will only be set aside so far as it might subject the heir to payment, but still subsist in order to affect the dead's part of the executory; for, as to the disposal of moveables, or affecting them to that extent, death-bed is no bar, *Et utile per inutile non vitiatur*.

53. Warrandice in a death-bed deed has no effect. A bond on death-bed still good as to the dead's part of the executory.

SECTION VI. *Impediments to Succession.*

^c 10 Annæ,
^d B. 1. tit. 2.
§ 62, &c.

THE lineal succession in lands here, to persons residing and dying abroad, is regulated by the law of this kingdom: for, as to subjects heritable, which are claimed here by the heir, he must be served *nearest and lawful heir*. And, in general, it is a rule, that feudal rights are governed by the law of the place where the subject lies, as above observed. And, by our law and form, one of the heads of the brieve of service being to inquire, "If the deceased died at the faith and peace of the king," there can be no succession to an alien in lands in Scotland; because such does not debase at the faith of our king, to whom he was under no faith or allegiance. But there may be persons residing abroad who are not aliens, *viz.* either natural born subjects, or their children, being protestants, tho' born abroad, and such are under no disability^c. Aliens can succeed to no lands in Scotland, as I have shown at large elsewhere^d. As to executory, either the species of moveables, or moveable bonds, they must go likewise to those who are next of kin, by our law, as is before shown.

54. The succession to persons residing abroad, regulated by the rules of succession, both as to heritable and moveable subjects, established in this country. Aliens cannot succeed, nor be succeeded to in lands.

^e B. 1. tit. 2.
§ 4, &c.

SOME persons are incapable to succeed to estates, devolving to them by law. Thus, besides aliens, as above, bastards can never be served lawful heirs, nor be executors at law to their father, who is supposed in law to be uncertain. It may be thought, that a bastard may confirm as nearest of kin to his mother, as was formerly observed^e; she being certain. I have not heard of any such confirmation practised; but it would seem, that a bastard may, as nearest

55. How far bastards excluded from succession by our law.

of

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of kin, confirm executor to her, and concur and draw an equal share of the moveables with the lawful children, if she has any; for, tho' bastards are entirely rejected as to the succession in heritage, it would seem consonant to our law, (as it was the law of the Romans in general, and is of other nations^a) that they should be admitted to succeed in moveables to their mother, and the relations on her part. That bastards are excluded from all succession to their father or mother in heritage, proceeds from the feudal customs, whence our brieve of mortancestry, for the service of heirs, is derived, and which is conform to the written customs of feus^b. And the peculiar tenor of brieves of service to heritage is, that the bearer is *Nearest and Lawful heir*, which plainly excludes bastards. But, in moveables, the civil law ought rather to be our rule; more especially, as there is nothing, in the reason of the thing, to hinder bastards from succeeding to their mother, and her relations, in moveables, no more being required to intitle one to such succession, but that the person is next of kin to the deceased; and there can be no doubt as to the child's relation to his mother, when he is a bastard, more than if she had been married to his father; whereas the father is, in the judgment of law, always uncertain, except where the children are procreated in the state of matrimony.

^a L. 2. l. 4. ff. unde cognat. Voet. ad fet^m Tertul. § 8.

^b Lib. 2. feud. tit. 26.

56. How far the king's legitimization can capacitate a party to succeed, or to be succeeded to.

THE common stile of letters of legitimization from the king is, that the party is not only enabled to make a testament, but likewise to dispoise his heritable estate on death-bed; and that, in case of no disposition made by him, his next heir at law, on the part of his father, shall succeed to him, in the same manner as if he had been born in lawful marriage. I have taken notice elsewhere, that such legitimization did take effect, as to the capacitating divers base sons of the same father to succeed to one another, in default of their lawful issue^c. And I can see no reason, why the king's legitimization may not have the effect to capacitate the grantee to be succeeded to by his heirs at law, since it is only the king's giving away his own right. But such grant, tho' ever so ample, could not enable the bastard to inherit to his relations; because that were an injury to the heirs at law, and a dispensing with the law of succession. I shall add no farther to what I have said in the before quoted place, and in the preceding title, on this subject.

^c B. 1. tit. 5. § 60.

57. Excommunication no bar to succession.

EXCOMMUNICATION was of old a bar to one's entering heir to his predecessor in his estate, even after the reformation; but now it infers no disability, in respect to that, or any other civil interest^d.

^d P. 1609. c. 4. rep. P. 1690. c. 28.

58. The case of succession devolving to papists, or children of popish parents, by the statute 1700.

THOSE of the popish religion, that are past the age of 15 years, cannot succeed in heritable subjects, unless they purge themselves of popery, by taking the Formula mentioned in the act^e. And if persons, educated in the popish religion, succeed before that age, they must purge themselves of popery before they attain to the foresaid age. And, in default of their so purging themselves, the next protestant heir may succeed, he making up a title to the succession, by serving as next protestant heir, within two years after it devolves by the foresaid irritancy; and, if he neglect, there is place for the remoter protestant heir, who would succeed if the other was dead.

^e P. 1700. c. 3.

The

The popish heir, tho' excluded, may thereafter enter to the succession, purging himself of popery, within 10 years after the irritancy is incurred, not counting the years of minority; but the intervening rents falling due during his exclusion, belong to the protestant heir, who entered with the burthen of the current interest of the debts.

THE protestant heir, after his entry, is no better than a trustee during the ten years within which the heir at law may purge himself of popery; except so far as concerns the overplus of the intermediate rents, after payment of the current interest of the debts wherewith the party excluded, or the estate was chargeable. He cannot affect the estate with any of his own debts, but may only grant infeftments for security of the debts of the predecessors. And, if he hath paid any of the debts during his incumbency, he is to be relieved of the same, with deduction of the current interest, by the heir, who recovers the estate on purging himself of popery: in which case, he must have it in the same condition as it was at the time of his exclusion.

59. How far the protestant heir, during the ten years after his entry, accountable on the popish heir's purging himself.

BUT after the ten years are expired, from the time of the popish heir's incurring the irritancy, (which I take to be from the time of the protestant heir's entry, by making up a title to the estate in a legal way) the popish heir excluded, and the heirs of his body, are forever barred from the succession. And the protestant heir takes and enjoys the estate, under the same tailie, irritancies, provisions and conditions contained in the infeftments of the same, as they stood in the persons of those to whom he succeeds.

60. After the 10 years, the protestant heir is in the same right of the estate as if he were the lineal heir.

IF the popish heir shall, notwithstanding the prohibition in the statute, make up titles to the estate, by service or otherwise, those titles would seem to be good to all intents, except against the next protestant heir, upon whose serving, these titles fly off. But I conceive that, according to the intendment of the statute, all debts and deeds of the popish heir, standing infeft in the estate, before his right is brought under challenge, will remain effectual; by the same rule that the debts of the popish predecessor, to whom the protestant heir serves, are sustained: and all other acts of rational administration, such as the receiving vassals by such popish heir, while he is in the title of the estate, are good^a.

61. How far the deeds of the popish heir, making up a title to the estate, good.

^a Feb. 14. 1750. duke of Gordon.

WHEREFORE, if the popish heir, having made up titles to the estate, dies vest and seised therein, the next protestant heir must serve to him, and be subject to his onerous debts and deeds; and can only set aside his gratuitous or fraudulent deeds, in order to defeat him of the succession. And if the next heir at law is protestant, he may serve directly to his predecessor, who died last vest and seised in the absolute right of the estate, liable to no challenge; without taking notice of, but neglecting the patched up titles that, perhaps, were made up in his immediate predecessor's person, to avoid the sanction of the act 1700; in the same manner as he might, in such predecessor's own time, have served himself next protestant heir to the ancestor deceased^b.

62. If the popish heir, having made up titles to the estate, dies infeft in it, the next protestant heir is liable to his lawful onerous deeds.

^b D. decis. duke of Gordon.

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63. The case of persons attainted of treason as to succession.

PERSONS attainted of high treason are excluded from all succession, and the rights devolving on them, regularly fall to the crown, by the escheat of *ultimus hæres*, thro' defect of an heir, as to lands holden of the crown, or of subjects, as is already shown ^a.

^a Sup. tit. 3.

64. One lying at the horn how far capable to succeed.

ONE lying at the horn, which infers a civil rebellion, cannot claim the succession till he is relaxed, if the objection is moved, as sometimes has been done. The reason is, that he has not *personam standi in judicio*, and so cannot appear to claim his right; and the lords of session, on a summary application, will relax him from all hornings, in order to prevent or remove the objection ^b, but in the mean time no other can enter. Infants, idiots, persons deaf and dumb, have right to succeed, under the direction and management of their tutors and administrators.

^b June 19. 1630. Earl of Crawford.

SECTION VII. *The Heir's Benefit of Deliberation, and of Entering upon Inventory.*

65. The annus deliberandi; what actions, may proceed within the year of deliberation.

SUCCESSION subjects the heir to the predecessor's debts, and therefore the law has indulged him, year and day after the succession devolves, to deliberate whether he shall enter or not, termed *Annus deliberandi*. Within this time the heir, unless he immix himself, or intermeddle with the heritage, cannot be pursued, in a personal action, by any of the creditors of the deceased ^c. During this period the apparent heir ought, if he act cautiously, to apply for a sequestration of the estate, to prevent any suspicion of his intermeddling. Actions of poinding the ground, not concluding personally against the heir, proceed within the year of deliberation, as remarked elsewhere ^d. But may there not be discharges of the debt, which the heir cannot make use of without incurring a passive title? For answer, The action is, notwithstanding, competent within the year; because it were unreasonable to stop the diligence of a creditor, on a possibility that the debt is discharged; and the ground being in place of a debtor, the creditor may operate his payment by this executorial action thereout, whether the debtor have a representative or not, and therefore it needs no charge against the heir to enter, in order to found it ^e; and, if the heir think proper thereafter to represent the debtor, he may obtain the decree to be restricted or set aside, on finding out discharges of the debt in whole or in part. A general rule may be laid down on this head, that actions, which conclude nothing personally against the defender, may proceed against the heir within the *annus deliberandi*; as a forthcoming upon an arrestment used in the ancestor's time, or an adjudication upon a decree of poinding the ground, which requires no previous decree of constitution. Declaratory actions, for the same reason, are competent within the year of deliberation.

^c P. 1503. c. 76. Dirlt. decif. 450.

^d B. 2. tit. 5. § 10.

^e Jan. 2. 1667. Oliphant.

66. Exhibitions *ad deliberandum* competent to the apparent heir.

THAT the heir may discover the circumstances of the estate, he may sue exhibitions *Ad deliberandum*, against all havers of writings concerning the same, which regularly he ought to do within the year of deliberation, tho' he is not limited to that period. However, if he is entred, the nature of the thing bars him from such action, as it does from the benefit of deliberation, tho' the year were still current. This year commences from the devolution of the succession by

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by the predecessor's death, or birth of a posthumous heir. I shall have occasion to treat farther on this privilege in the next title.

^a P. 1695.
C. 24.

^b Fount. Feb.
21. 1708.
MacKay.

^c Fount. Feb.
1. 1704.
Bruce.

^d Hume
(heir cum
beneficio)
Dec. 1725.
Aitkenhead.

FOR the same reason that the *annus deliberandi* was introduced, an heir, by virtue of the statute, may enter *Cum beneficio inventarii, i. e.* upon inventory, as use is in executory ^a. This inventory must contain all the heritable subjects belonging to the ancestor, and must be duly subscribed by the heir or his tutors, on oath, before the judge ordinary of the place where the lands lie, as to rights whereon infestment followed; but, as to others, the judge of the place where the deceased resided is competent. The inventory must be expedited within year and day after the succession devolves; and it was found, that, if it is so perfected, the heir may serve after the year ^b; for, as the statute does not expressly require an actual service within the year, so it may sometimes be impracticable. As for example, if the deceased granted a conveyance of the estate upon death-bed, which must be removed before the heir can serve therein; and which ordinarily cannot be accomplished within so short a period. However the inventories must be registred, in the books of the judge ordinary, within the year and day, and the extract thereof recorded in the general register at Edinburgh, within 40 days thereafter. This privilege is competent to a second apparent heir, within year and day after the death of a former ^c.

By this kind of entry, the heir is only liable to the creditors to the extent of the inventory, and has his own claims saved to him. The creditors are preferred according to their rights and diligences against the deceased, or the diligences wherewith they affect the subjects after the succession devolves. But what compositions the heir gets from any of the creditors, in transacting their debts, accrues to the rest ^d. But after the heir; in a proper action, has got the subjects of the inventory valued by the court of session, and the value proportioned by them among the creditors, he may take course with the debts in the easiest manner he can; without any challenge from the other creditors, to whom he is only answerable for their proportions of the value, and so is not liable to communicate to them the eases got on such transactions. Whereas, before the conclusion of such process, the heir upon inventory is only considered as trustee for the creditors, and in that respect is bound to communicate the benefit of compositions then made in transacting any of the debts.

If the heir fraudulently omits any thing out of the inventory, he loses the benefit; and if it is without fraud omitted, he must add it to the inventory within 40 days of his coming to the knowledge and possession thereof, such eik or addition being given in and recorded in like manner as the principal inventory. The heir likewise forfeits the benefit of inventory, if he have any intromission with the heritable estate of the deceased, other than necessary for custody and preservation, before the inventory is expedited and recorded. And therefore the writings ought all to be sealed up by order of a judge or magistrate, and not otherwise intermeddled with than by authority, and at the sight of a judge, and receipts left in the repository of the writings taken thereout by such warrant.

67. The heir's entring on inventory; procedure upon it.

68. The privileges accruing to the heir by such service.

69. The penalty of fraudulently omitting any thing out of the inventory, and wrongful intermeddling.

THE

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70. How far the parallel between an heir upon inventory, and an executor, holds.

THE act allows heirs to enter upon inventory, *As use is in executory*: but the parallel holds only as to their being liable no farther than to the extent of the inventory: for the heir is not bound to find caution for the price, or, even in the inventories to value the estate, both which is incumbent on the executor. However, after a long dependence, touching the distribution of the price among the creditors, the court ordained the heir to consign it in their clerks hands on or before a day limited; and, on failure, appointed a factor for raising diligence against the heir, to recover it for the behoof of the creditors, as they should in the event be preferred ^a.

^a July 1741.
creditors of
Crichan.

71. What advisable for the heir to do, either before or after serving on inventory.

AN heir intending to enter upon inventory, if he acts cautiously, ought not to possess the estate, but apply for sequestration of it in the mean time, and, after he is served on inventory, bring an action for valuing it before the lords of session. In this process the creditors ought to be called, in order that they may see the estate duly valued: for this purpose they will get a conjunct probation allowed them with the pursuer, for proving the value of such lands, in that part of the country where the estate in question lies. But the heir is not bound to expose it to roup for drawing the utmost value; for that might deprive him of the estate, which the law allows him to hold at the value ^b.

^b Hume
(heir cum
beneficio)
July 6.
1733. Gray.

72. An heir, upon inventory, cannot question the deeds of the person to whom he is served.

IF one serve upon inventory, to a person that was only apparent heir in the estate, he cannot challenge or reduce any deeds granted by him in relation to that estate, (more than the deceased himself could), if the estate was given up in the inventory, as belonging to him, even tho' the party was served likewise to his predecessor that died last intest in the estate; because the privilege of inventory saves only the heir from being liable beyond it to the creditors; but cannot intitle him to counteract the deed of the person whom he represents, with respect to the subjects of the inventory ^c. In the process for valuing the estate, there may be likewise a multiple-pounding labelled, for distributing the price among the creditors, whereby the heir will be wholly exonerated.

^c Edgar, Feb.
25. 1725.
Corriens.

73. Such heir not bound to bring the estate to a roup, but may do it for his exoneration.

THO' an heir upon inventory is not bound to expose the estate to roup, as just said, yet the fairest and most effectual method for him, in order fully to exoner himself, is to bring an action for sale of the subjects of the inventory, before the court of session, and therein call the creditors to be ranked on the price, and the overplus, after their payment, will belong to himself, and he may be purchaser, as the highest bidder at the roup. Tho' such process of sale is not specially warranted by the act 1695, yet it is implied in the nature of the thing, for the heir's more ready and effectual exoneration, and the court found accordingly that such action ought to be sustained ^d.

^d July 1742.
Robert Mac-
Donall con-
tra creditors
of Kelton.

74. The creditors may carry on a ranking and sale of the estate, notwithstanding the heir's

IF the creditors of the deceased have affected the estate by adjudication, or have other proper title to carry on a ranking and sale of the same, nothing hinders them to raise and insist in such action after his death, notwithstanding the heir's entring upon inventory, as the lords of session found, after an hearing in presence, and solemn deliberation ^e; because the intent of the statute was not to prejudice the

^e Hume ibid.
July 12.
1738. Stra-
chans.

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the creditors, of this most effectual means of recovering payment of their debts. entering up-
on inventory.

AN heir, upon inventory, may voluntarily sell the estate, and pay the price, without collusion, to the creditors of the ancestor, as they apply, *primo venienti*, and thereby exoner himself. But, while the price is unpaid, the creditors may affect it by their diligence, and the heir, after he is interpellated by citation, cannot safely pay, but upon a multiple-poining, calling all the creditors, in order to exonerate himself, and do justice to them, according to their grounds of preference; but the first citation of the heir will give no privilege^a.

^a Nov. 28.
1738. credi-
tors of Cri-
chan.

Observations on the Law of England, in relation to the Premises.

SUCCESSION in heritage is by descent. This, in a legal understanding, is, "When land and other heritage is, after the death of the ancestor, cast, by course of law, upon the heir." It is the noblest and worthiest means whereby lands are derived from one to another; because it is wrought and vested by act of the law, and right of blood, and kindred of the ancestor. In the civil law an heir may be by testament, but, by the common law, he is only heir who succeeds by right of blood^a. Descent is either by common law, custom or statute. Descent, by common law, is either lineal, or collateral. Lineal descent is conveyed downward, in a right line, from father to son. Collateral descent is derived from the side of the lineal, as one's brother, or the father's brother: and the father's brother and his posterity, as next cousin, shall always inherit before the grandfather's brother and his posterity^b.

^a Coke 1.
inst. 238.

^b Coke ibid.

1. Descent, the worthiest means of conveyance of lands by common law; it is either lineal or collateral.

THERE is a Next in blood by right of Representation, and Next of blood by right of Propinquity. In descents he is next of blood, that is such by right of representation, for he is next of blood inheritable; and, whenever the father, if he had lived, should have inherited, his lineal heir, by right of representation, shall inherit before any other, tho' nearer in blood by right of propinquity. But there is a diversity in law between a next of blood, Inheritable by descent, and next of blood Capable by purchase; for, if one make a lease to one, the remainder to his next in blood in fee, his second son shall take the remainder, and not the son of the eldest son deceased, who is notwithstanding his heir, as next of blood by right of representation^c.

^c Coke 1.
inst. 10.

2. Next of blood, either by right of representation, or by right of propinquity; in descent, propinquity by representation regarded. It is otherwise in purchase.

IN this I conceive our law agrees with that of England; but, in rights of lands, the destination commonly is to a person and his Heirs, but seldom to one and his Next of blood. But, if a purchase were made "to one, and the heirs of his body, whom failing, to his next of blood," his next relation by consanguinity would, in my apprehension, succeed, in default of his issue, as heir of provision to him.

IT is a maxim in the law of England, That inheritance may lineally descend, but not ascend. Thus, if there be father and son, and the father has a brother, that is uncle to the son, and the son purchase lands in fee-simple, and die without issue, living his father, the uncle shall have the land and not the father, tho' the father is nearer.

3. Inheritance can never lineally ascend, but may collaterally. The father's brother, and not

the father,
succeeds.

in blood. But, if the uncle enter into the land, as heir to the son, and dies without issue, living the father, the father shall have the land as heir to the uncle his brother, and not as heir to his son; for he comes to the land by collateral descent, and not by lineal ascent, which can never take place. This was the rule of succession by the feudal law of the Lombards^b. And likewise held antiently with us, viz. that the father could not succeed to his children in feudal subjects^c; and his right of succeeding to them, dying without issue, was doubted, in Sir Thomas Craig's time^d. Collateral ascent, from one to his uncle, is not prohibited by the above maxim.

^a Littl. sect. 3.

^b Lib. 2. feud.

^c 27. 51.

^e Reg. maj.

lib. 2. c. 25.

34.

^d Lib. 2. feud.

diag. 13.

OUR law at present differs in this from the law of England: for, by our established law, since Craig's time, a father, in default of his own issue, will succeed to his son dying without issue, preferably to the son's uncle, the father's brother. And it is not easy to perceive the reason of the maxim, which prefers the uncle to the father, in the succession to the son. It seems only to have antient usage in the feudal customs to recommend it, as above.

4. One that
claims as heir
in fee, must
be heir to him
that was last
seised of the
freehold.

It is another maxim in the law of England, That a man that claims, as heir in fee-simple, to any man by descent, must make himself heir to him that was last seised of the freehold and inheritance. So that, in the fore said case, if the uncle had not entered, the father could not succeed, for then the last seised of the actual freehold was the son, to whom the father could not be heir^e. We, in effect, observe this maxim, for an heir must be served and infeft, as such, to the last infeft in the lands; but, in no event can a father's brother succeed to the son preferably to the father.

^e Coke 1.
inst. 11.

5. Tho' one
succeeds as
heir, yet, if
a nearer
thereafter su-
perveen, he
ousts the o-
ther, and
takes the
right.

SOMETIMES one that is heir, at the time of the descent, may cease to be such, by the law of England. Thus, where the uncle succeeds to the son, dying without issue, if the father hath issue afterwards, such issue shall enter upon the uncle. Or, if a man has issue, a son and a daughter, and the son die without issue, the daughter shall inherit the land; but, if the father afterwards have a son, this son shall enter into the land as heir to his brother; or, if the father thereafter have issue, a daughter, and no son, she shall be co-parcener with the sister^f. Thus, by the birth of an heir, more near, the descent to another shall be defeated, or abated.

^f Coke ibid.

It is, on the contrary, a rule with us, that *Semel hæres semper hæres*, one that is heir at the time of the succession's opening continues such, tho' there happen a nearer to superven; as in the case of a father's succeeding to his son, dying without issue, tho' he should, after his titles are made up, have other children who would have inherited the deceased child, had they been in being at the time; yet he shall retain the estate, and his next heir shall succeed to him in the same.

6. None can
be heir to a
man in fee-
simple, unless
he be of the
whole blood.

A THIRD maxim, in the law of England, upon this head is, That none shall be heir to any man in a fee-simple, unless he be of his whole blood; for, if a man have issue, two sons, by divers venters, and the elder purchase lands in fee-simple, and die without issue,
the

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the younger brother shall not inherit to him therein, but the uncle of the elder brother; because the younger brother is but of the half blood to the elder^a. But if the uncle, after being seized, die without issue, the younger brother may succeed to him, for he is of the whole blood to him, tho' of the half blood only to his elder brother.

^aLittl. sect. 6.

If the father's widow be endowed of the third part of the lands, and while the dower continues the eldest son dies without issue, the brother of the half-blood, and not the sister of the whole blood, shall have the reversion of the third part after the widow's death; because the actual seisin, which the deceased brother had obtained, was defeated, as to the third part, by the widow's entry into it; who is esteemed in law to be in continuance of the husband's estate without any interruption^b.

^bBac. new
abr. (descent)
31.

In this point there is likewise a diversity between our law and the law of England; for, tho' brothers, or even sisters, of the whole blood exclude brothers by the half-blood; yet, failing brothers or sisters-german, brothers or sisters-consanguinian, or on the part of the father, succeed preferable to the father, and much more to his collaterals. And, as to the second point, the whole estate descends in fee to the heir, notwithstanding the third of it be subject to a terce.

As the half-blood is an impediment to descent, so there are other incapacities that bar one from inheriting, as that of bastardy. But there is a special kind of bastardy, by the law of England, that does not bar one from an entry into the lands of his father, on a claim as heir. This is the case of a bastard Eignee, of which I have spoken elsewhere^c. As also, an alien born cannot inherit, nor one whose blood is corrupted by attainder of treason or felony, of both which I have treated in their proper places^d.

^cB. 1. obser.
tit. 5. § 52.
^dB. 1. tit. 2.
obser. tit. 3.
sup.

If there be three brothers, and the middle brother purchase lands in fee-simple, and die without issue, the elder brother shall have the land by descent, and not the younger; and, if the youngest purchase lands in fee-simple, and die without issue, the eldest brother shall have the land by descent, and not the middle brother, for that the eldest is most worthy of blood. And it is a maxim in law, That the next of the worthiest blood shall always inherit, as the male, and all descendents from him, before the female, &c^e. By our law, the succession between brothers stands upon a different foot, as I have shown in the foregoing title.

^eLittl. sect. 5.

LANDS and tenements, in fee-simple, descend by the law of England; 1. To the eldest son, and his issue, and, failing sons, to the daughters equally as co-parceners. 2. If the eldest son dies without issue, the succession goes to his next eldest brother of the whole blood, and his issue; and, for want of brothers, to sisters of the whole blood. It is a maxim of the law of England, that *Posseffio fratris, in feudo simplici, facit sororem esse hæredem*^f, the brother's possession of lands in fee-simple, as heir to his father, makes the sister-german to inherit, if he die without issue, in preference to a brother of the half-blood; but otherwise the brother will inherit as heir

^fIbid. sect. 8.
et ibid. Coke.

7. While the dower continues, there is no descent of the lands subject to it.

8. How far a bastard, an alien, or one whose blood is corrupted, can inherit.

9. In the succession to a brother, dying without issue, the eldest, as worthiest of blood, always succeeds.

10. The rules of succession to lands in fee-simple.

to

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to his father. 3. For want of brothers, or sisters of the whole blood, to an uncle of the whole blood, and his issue; and, for want of uncles, to aunts, and their issue. 4. In default of uncles and aunts, and their issue, to the great uncle, or great aunt of the whole blood, in the same order, and their issue. 5. In default of all those, to the next of kin in the collateral line of the whole blood. But half-blood is no impediment to the descent of lands of the crown, so that a brother of the half-blood will bar a sister of the whole blood in these^a; for they must always attend upon, and follow the crown, which descends in that manner. There is likewise a diversity in the succession to dignities, as that of duke, marquis, &c. for in those a sister of the whole blood shall not exclude a brother of the half-blood; because he, being heir to his father, shall inherit the dignity inherent to the blood of him who was first created noble^b.

^a Coke 1: inst. 15.

^b Coke ibid.

13. In a purchase, failing heirs on the part of the father, those on the part of the mother succeed; but, in the case of lands by descent, the maxim, *Paterna paternis, materna maternis*, takes place.

If a son purchase lands, and die without issue, and there be no heir on the part of his father, the lands shall descend to the heir on the part of the mother. But where lands descend from the part of the father to the son, the blood of the mother shall never inherit; and where lands descend from the part of the mother, the heirs on the part of the father shall not inherit. There is therefore a great difference in the succession to a son, in the case of a purchase of lands; and that of his coming to them by descent^c: in this last, if the son die without issue, the certain rule is *Paterna paternis, materna maternis*. If the lands purchased once descend to an heir, on the part of the father, and then the line of the father (after entry and possession) fail, it shall never resort to the line of the mother; tho', in the first descent from the son who purchased the land, it would have descended to the heir on the part of the mother, upon the son's death without issue; for now, by this descent and seisin, it is lodged in the father's line, to whom the heir, on the part of the mother, can never derive a title as heir. The like rule holds, where the land descends to the heir, on the part of the mother, who enters and possesses^d.

^c Littl. sect. 4. et ibid. Coke.

^d Bac. new abr. (descent) 29.

By our law, the mother, or any relations by her, can never succeed, either in heritable or moveable subjects, without distinction, whether they proceed from herself, or on her part, or not. So that the above maxim, which not only holds in the law of England, but likewise in some other countries, *Paterna paternis, et materna maternis*, has no place with us.

14. If the issue of a bastard purchase land, and die without issue, it shall descend to heirs on the part of the mother.

As in the case of a purchase, the relations on the part of the mother inherit, in default of those on the part of the father, by the law of England; therefore, if the lawful issue of a bastard purchases land, and dies without issue, it shall descend to the heirs on the part of the mother of such issue, for they make not any conveyance by the bastard^e. With us, in such case, the land would go to the king, as last heir.

^e Ibid. 250.

15. Descents by custom; gavel-kind such; by it all the sons or brothers in-

DESCENTS of fee-simple, by custom in England, are of various kinds. Thus, in the county of Kent, North Wales, and other parts of England, where lands and tenements are holden in Gavel-kind, by the custom and use, out of mind of man, the issue-male inherits all

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all equally; and, by the same custom, when one brother dies without issue, all the brothers may inherit. Gentry and arms are of the nature of gavel-kind; for they descend to all the sons and their posterity, every son being a gentleman alike, but the eldest shall have, as a badge of his birth-right, his father's arms, without any difference: and all the younger brothers shall have several differences, or marks of distinction^a.

^a Littl. sect. 210, 265. et ib. Coke.

SOME borows likewise have such custom, that if a man have many sons, and dies, the youngest shall inherit all the tenements which were his father's within such borow, as heir to him, by force of the custom. This is called Burrough-English, so named, because that custom was first (as some hold) in England^b.

^b Littl. sect. 211. et ib. Coke.

IT is observed by the English lawiers, that all the lands in England were generally gavel-kind before the conquest; but that soon after, for the better support of the crown, tenure by knight-service was introduced, and therein the eldest son inherited. And thereafter, by the statute *De donis conditionalibus*, estates-tail were created, the lords and great men being fond of perpetuating their names, and handing down their estates to their families^c. And thus, in socage lands, primogeniture by degrees also took place. It is observable, that in gavel-kind lands, the wife shall have dower of the moiety of her husband's lands; and that the husband's courtesy obtains, tho' there be no issue^d. We never had any such custom as that of burrough-English that I know; but I find that the same rule of succession with that of gavel-kind took place of old with us, as appears from the books of the Majesty^e. And it is certain, that the same order of succession obtained among the Romans before the emperor Justinian's time, who introduced the succession of all the children, male and female, equally^f; which he affirms to have been according to the antient law of the Twelve Tables^g. And, by the feudal law of the Lombards, or the written books of the feus, all the sons succeeded alike^h.

^c Vin. (gavel-kind) p. 15.

^d Coke 1. inst 111.

^e Lib. 2. cap. 21.

^f Nov. 118.

^g § 5. inst. de exhered. liberor.

^h 2 feud. c. 27.

A PRIVILEGE of gavel-kind by the custom is, that tho' the father be attainted of felony, and hanged, yet the son shall inherit: hence it is commonly said, *That the father shall go to the bough, and yet the son to the plough, viz.* That the father is executed for the crime, but the estate is saved to his heirⁱ; which is contrary to the prescription of the common law, whereby lands, in such case, escheat to the lord. Our law is the same, as by the custom, in this respect.

ⁱ Vin. (gavel-kind) 16.

IN place of entails of land-estates, with divers branches or series of substitutions, they have remainders in England, of a similar nature, in the settlements of their estates. A Remainder is annexed to a particular estate: thus, a man makes a lease for life or years, remainder to another in fee-simple, fee-tail, &c. is an Absolute remainder. But if the remainder is to the right heirs of another who is alive, this is a Contingent remainder: for if the tenant for life shall die, living the other person to whose heir the remainder is settled, the remainder is gone; because it could not take effect when the particular estate was determined by the death of the tenant for life, since the other to whose heir it was limited was still in life, and so

herit; how does it take place in dignities.

16. Borow English; by it the youngest son inherits.

17. Succession by gavel-kind, supposed to have taken place over all England; how altered.

18. Gavel-kind lands are not forfeited by attainder of felony.

19. Remainders; they are annexed to a particular estate. If an estate is settled to one for life, remainder to his right heirs, the frank tenement is in him.

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could have no heir to take the remainder. But if the grant were "to one for life, remainder to his right heirs," this remainder is executed immediately, and does not rest in contingency, in as much as the tenant for life, to whose heirs the remainder is limited, has the frank tenement^a. I have discoursed a little upon remainders in another place^b, to which I shall add no farther.

^a Vin. (remainder) p. 403.
^b B. 2. tit. 3. observat. § 41.

By our law, one may entail his estate to the heirs of the body of a certain person, and if the succession shall open before his death, his eldest son may be served heir of entail to the person who made the deed of entail. For, according to the language of our law, the heir of entail is only intended the heir *Designative* of the other person, viz. to point out and describe him who is to be the heir of entail, but not as if he were actually to be the heir of his father; since, tho' his father were dead, he might take the entailed estate without serving heir to his father. And therefore he may serve heir of entail, as well during his father's life as after his death

20. Succession in fee-tail by statute.

By statute, heirs succeed in fee-tail, according to the act that regulates the same^c, concerning which I have discoursed elsewhere^d.

^c Westm. 2. or 13 Edw. I. c. 1.
^d B. 2. tit. 3. observ. § 20, &c.

21. The law of death-bed, the annus deliberandi, or the benefit of entering upon inventory, takes no place in the law of England; an heir only liable to the extent of the assets.

THE privilege of heirs, that they cannot be prejudiced by gratuitous deeds, granted by their ancestors on death-bed, takes no place in the law of England. But the law of death-bed is a most beneficial one for securing men of estates from being imposed upon, or importuned, in their languishing condition, to execute deeds which probably in their health they had no thought of granting, and would not have been prevailed upon to do it. Heirs have likewise with us an year, after the inheritance descends, to deliberate whether they shall enter or not. And farther, our law indulges heirs to enter to their ancestors upon inventory, whereby they shall only be liable for the debts to the extent of the subjects in the inventory. There is occasion for none of those privileges in England; for, by the common law there, it is a good plea for the heir, when pursued upon the obligations made by his ancestors, "binding himself and his heirs," That he had no assets, or lands by descent, for payment of the debt^e. So that an heir, by the law of England, cannot regularly be reached beyond the value of the subjects to which he has right by descent. Whereas, by our law, an heir entering at large is liable to all the debts of the ancestor, without respect to the extent of the subjects descending to him.

^e Coke 5. rep. 60.

22. Upon attainder of felony, and in the case of bastardy and last heir, the lands escheat to the lord.

As to disabilities that bar one from inheriting, they are the same by the law of England as with us, in respect to aliens and persons attainted of treason. But by their law, upon an attainder of felony, which infers a corruption of blood, the party's issue cannot succeed; and in it, and in the case of bastardy and last heir, the lands become escheat to the lord, for defect of an heir^f. Which is otherwise with us, as I took notice in the foregoing title. Persons born dumb and deaf, idiots, madmen, outlaws in civil cases, persons excommunicated, men attainted in a *premunire*, or convict of heresy, may be heirs^g. In all which there is no diversity between the law of England and ours.

^f Coke 1. inst. 13.

^g Coke 1. inst. 8.

IN

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^a 11 and 12
Will. III.
c. 4.

IN the case of papists, there is some diversity between the law of England and that of Scotland. By the statute in England ^a, "If any person educated in the popish religion, or professing the same, shall not, within six months after he or she attains the age of 18 years, take the oath of allegiance and supremacy, and also subscribe the declaration contained in 30. Charles II. in the court of king's bench, or quarter sessions of the county where they reside, every such person, in respect of him or herself only, and not in respect of any of their heirs or posterity, shall be disabled to alienate, or take by descent, devise, or limitation, in possession, reversion or remainder, any lands, tenements or hereditaments, and that during their life; until they take the said oaths, and subscribe the said declaration. And the next of kindred to them, who shall be a protestant, shall have and enjoy the said lands, &c. without being accountable for the profits." But in case of any wilful waste committed by the person so enjoying the lands, &c. the party disabled taking the said oaths, his executors or administrators may recover treble damages for the same. And such persons are likewise made incapable, by the said statute, to purchase, either in their own names or others, for their use, any manours, lands, or issues and profits out of the same; and all such estates, or other interests so to be made, are declared void and of none effect.

23. Papists are disabled to alienate lands, or to take them by descent, and the next of kindred shall have them; nor can they purchase lands.

^b 3 Geo. II.
c. 18.

By a subsequent statute ^b, "No sale, for a full and valuable consideration, of any manours, &c. by any person being reputed owner, in possession, or receipt of the rents and profits thereof, to or for any protestant purchaser, shall be impeached, by reason of any of the foresaid disabilities, incurred, or supposed to be incurred by any person making or joining in such sale; unless before such sale, the person intitled to have advantage of such disability shall have recovered such manours, &c. by reason of the same disability or incapacity, and have entered such claim in open court, at the general quarter sessions *bona fide*, and with due diligence pursued his remedy in a proper course of justice for recovery thereof."

24. Lawful purchasers, being protestants, of lands from papists, are safe; unless the next protestant heir had before recovered such lands.

^c 11 Geo. II.

AND, by a third statute ^c, for encouragement of persons educated papists to embrace the reformed religion, it is provided, "That persons who had incurred the foresaid disability, conforming, shall hold and enjoy all such manours, &c. as if no such disability had been incurred; unless the person, intitled to take advantage of such disability, hath actually and *bona fide* recovered, or shall recover such manours, &c. by judgment or decree, in some action or suit, six calendar months before the making of the record of the said person's conforming, and to be prosecuted with due diligence." But this act shall not prejudice the right of any person intitled to take advantage of such disability, who shall be in quiet possession of such manours two calendar months precedent to the making such record. If the person conforming shall thereafter return to the popish religion, he shall be forever incapable of any benefit by this statute.

25. Papists conforming shall hold and enjoy their lands, unless the party intitled hath recovered the same by judgment or decree. If he thereafter returns to popery, he is forever disabled.

^d Bac. new
abr. (papist)
799.

A PAPIST may be tenant in dower, or by the courtesy; because, in those cases, it is by operation of the law, and not by the act of the party, that the estate comes to her or him ^d.

26. A papist may be tenant in dower, or by the courtesy.

WHERE

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27. The lands descend to the heir, tho' a papist, and the next protestant relation has only the perception of the rents.

WHERE an ancestor dies seised of an estate, it descends upon and vests in the heir, (tho' a papist) and the next protestant relation to him has only a right to the perception of the rents and profits during the nonconformity of the heir^a. But, by our law, the next protestant relation, intitled to succeed, may be served protestant heir; so that, after such service, the law vests him with the character of heir, under the burthens and conditions mentioned in the statute^b.

^a Bac. ibid.

^b P. 1700.
c. 5.

28. A defendant is not bound to discover whether the person, from whom he derives right, was a papist.

IT is a rule in the law of England, That no person is bound to discover what might subject him to a penalty in an act of parliament. And therefore, in a suit before the court of chancery, for evicting an estate from the defendant, upon this ground, That the person who first devised it, was a papist, and consequently that the last devise of the same was void; the plaintiff having insisted that the defendant should discover whether the person, under whose will he claimed, was a papist, the defendant pleaded the foresaid rule, and it was held good^c.

^c Bac. ibid.
801.

29. Executors, those to whom the execution of the testator's will is committed by him; administrators, those to whom the administration is given by the ordinary.

IN the law of Scotland, executors are said to be heirs in moveable subjects, *Hæredes in mobilibus*. We apply the term *Executors* both to executors named by the testator, to whom the execution of his will is committed; and to the next of kin, who may obtain themselves decreed and confirmed executors at law, to execute the will of the law with respect to the intestate. But, by the law of England, executors are understood only of those to whom the execution of the testator's will is committed, by his testament; and those to whom the management of the goods and chattels of the intestate is intrusted, by the ordinary, are called *Administrators*: but their power and duty is little different from that of executors.

30. Of old, the ordinary had it in his power to grant the administration to the wife, or which of the next of kin he pleased.

As there is a considerable diversity in our law between the persons intitled to inherit, as heirs properly so termed, and those called as executors at law, who succeed in moveables; so there is a diversity between the persons who inherit as heirs, by the law of England; and administrators, or those to whom the succession, or interest in the moveables or chattels of the intestate, belongs; which shall therefore be observed in a few words. By the old statute, the ordinary deputed the next and most lawful relations of the intestate to administer his goods, who had action to recover the debts due to the intestate; and were to answer in the king's courts to others to whom the intestate was bound, and to be accountable to the ordinary, as executors are in the case of a testament^d. And, by a later act, the ordinary was to grant administration of the goods of the intestate to his wife, or to any of his relations, as he should think fit^e.

^d 31 Edw. III.
c. 11.
^e 21 H. VIII.
c. 5.

31. The ordinary must take bond from the administrators; how distribution must be made. If there is no wife, the whole goes to the

THE bishop had it thus in his power to give the goods either to the widow, or any of the next of kin, at his pleasure; so that the law allowed him to favour the one or other of them as he thought proper; which discretionary power was, no doubt, most inconvenient; but that matter was put upon a more reasonable foot, by a subsequent act, which is the rule at present^f. The ordinary, upon granting administration, is to take bond of the administrators, with sureties, that they shall make a true and perfect inventory of all the goods and

^f 22 and 23
Ch. II. c. 10.

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and chattels of the deceased, and to make a true and just account thereof, and (after payment of the debts and charges) distribution of the surplusage in this manner, viz. one third to the wife of the intestate; and the residue amongst his children, and such as legally represent them who are dead, except such children who had any estate by the deed of the intestate, equal to the other's share, or otherwise, to make the shares of all to be equal. But the heir at law shall have an equal share in the distribution with the other children, without consideration of what land he has by descent, or otherwise. If there are no children, or the representatives of them, the one half of the intestate's goods and chattels shall go to the wife, and the residue to the brothers and sisters of the intestate, in equal degree, and those that represent the deceased. If there is no wife, all shall be distributed amongst the children, or other next of kin. No representatives shall be admitted among collaterals, after brothers and sisters children: and, if all the brothers and sisters are dead, their children come in *per capita*, and not *per stirpes*, so that, in such case, there is no representation among them^a.

children; no representation after brothers and sisters, and their issue.

^a Bac. new abr. (executors) 127.

^b 1 Vent. 307.

KINDRED by the half-blood, whether by father or mother, shall have a share in the distribution equally with those of the whole blood^b. They to whom distribution shall be made must give security to refund the administrator, in case debts afterwards appear.

32. The half-blood have an equal share with the whole blood.

SUCH regard is had to creditors, by this statute, that it ordains, That no distribution be made till one full year be expired after the intestate's death; but if a person intitled to a distributive share die within the year, yet there is such an interest vested in him, that it shall go to his executors or administrators. For this statute being, in the nature of a will, for all persons that die intestate, those to whom a distributive share belongs, ought, in this instance, to be resembled to a residuary legatee, dying before the debts and legacies are paid, whose executors or administrators shall have the whole residue, and not the executors of the first testator^c.

33 No distribution to be made till expiration of one year; but such as die within the year transmit their shares.

^c Bac. new abr. (executors) 429.

ON this statute it hath been holden, that notwithstanding it ordains, that the heir, without regard to the land-estate descending to him, shall have an equal proportion with the other children; yet, if he hath a settlement or provision made to him in his father's marriage-articles out of the personal estate, he must bring it into hotch-pot to intitle him to more^d.

34. On what condition hath the heir an equal share in the distribution with the other children.

^d Bac. ibid.

ADMINISTRATION is granted in this order: 1. to the children of the intestate; 2. if there be none, to his father; 3. in default of the father, to the mother; 4. if there is no father or mother alive, to his brothers or sisters of the whole blood; 5. to brothers or sisters of the half-blood; 6. to the next of kin, uncles, aunts, or cousins; 7. to a creditor; and lastly, if none of those apply for the administration, it may be given to any other person, at the discretion of the ordinary^e; but every administrator must pay the debts in due order, and distribute the effects of the deceased, as the above statute directs. How far our law differs from the premises, appears from the foregoing title: I shall only remark here, that the deceased's mother, or kin-

35. To whom administration granted.

^e Coke 4. rep. 51. 1. Roll. abr. 918. 1. Vent. 359.

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dred by her, even brothers or sisters uterine, *viz.* on the part of his mother, have no interest in his estate, heritable or moveable. In this particular, our law is as unfavourable to the mother, and to the kindred on her part, as the law of England is to both parents in the succession to heritage.

36. How far relief competent to the heir against the personal estate.

THE heir is most favoured by the law of England; as he is likewise by ours, but not quite so much. Thus, tho' the land descending to the heir is expressly subjected to the debts, as in the case of mortgages, yet he shall be relieved by the executors, so far as the personal estate will extend. And, if the heir pays, he shall recover the same from the executors; but, where debts by specialty, which are a lien upon the real estate descending to the heir at law, are paid out of the personal estate, those by simple contract shall come in the place of the land-creditors, and be paid out of the lands. And, if the ancestor contracts for the purchase of lands, and dies before a conveyance of the same is made to him, the heir may compel the executor to pay for the same, if he has assets^a.

^a Ibid. 283, &c.

In this last case our law agrees with that of England; and likewise where real creditors take their payment out of the executory, and thereby exhaust it, it would seem, that death-bed creditors, and legatees, who cannot affect the heir, should be intitled to an assignment from the creditors in heritable debts. But our law differs as to the first point; for, where the land is expressly subjected to an incumbrance, by heritable bond, (which resembles a mortgage) or otherwise, the heir is so far from being intitled to relief of the same, against the executor, that he is liable to the executor in relief thereof.

37. If one of the co-parceners is within age, the rest have the benefit of her minority.

WHERE lands descend to two co-parceners, and one of them is within age, or minor, the other shall have the benefit of her minority, and all the privileges and advantages competent to an heir within age, for they are but one heir^b; as I observed in another place more largely^c.

^b Vin. (parceners) p. 171, &c.
^c B. i. tit. 7. observ. § 37.

T I T. V.

Heirs.

SECTION I. *Presumptive, and apparent Heirs.*

1. Presumptive, and apparent heir, who.

ONE regularly cannot be understood an heir till after the ancestor's death: for, according to the maxim of nature, *Viventis nulla hæreditas*, there can be no succession to a person alive. One intitled to succeed to another is, generally, in such person's life, termed with us his Presumptive Heir; and after the ancestor's death, the heir, before his entry, is called the Apparent or Apperand Heir. We shall consider the privileges of both in their due order; and then proceed to the entry of heirs, and their respective qualities, in the character of heirs actually entered.

2. One apostatizing from the protestant to the popish religion.

By express statute with us, "If any person professing the protestant religion, as by law established, shall apostatize from the same, by professing the popish religion, or practising the idolatries and superstitions thereof, he shall thenceforth forfeit his whole heritable estate

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"state to his next heir at law, being protestant, as if he were naturally dead; without prejudice to the anterior creditors of the person apostatizing, and his predecessors, personal or real".^a on, forfeits his land-estate to his heir.

^aP. 1700. c. 3.

Thus likewise, "All securities or conveyances of lands or tenements, granted for money, won by gaming or betting, on the sides of such as play, shall enure, and be to the sole use and benefit of, and devolve upon such person as might be intitled to such lands or tenements, in case the granter had been naturally dead and all grants or conveyances for preventing such lands from accruing to such person, intended to enjoy the same, are void".^b

^b9 Annæ, c. 13.

3. Lands conveyed, or incumbered, for money won by gaming, devolve to the heir, as if the granter were dead.

THE presumptive heirs of a marriage, in the case either of provisions of particular lands, or of a sum of money, may insist against their father for taking the lands, or employing the sum in terms of the provision; but always so, as he shall still remain fiar. And the children, as heirs of provision to him, shall be subject to his onerous deeds^c; unless he has become bound to denude of the lands, or pay the sums at a precise term, which happens during his life^d. And, as to a provision of conquest during the marriage, it may be ascertained in the father's life, after dissolution of the marriage, by the wife's death, since the mean of proof may be only his oath; but it must be finally computed, as the same stands at his death^e.

^cFeb. 13. 1677. Frazer. Fount. Jan. 31. 1705. Cairns.
^dHume decif. 45. id. decif. 51.
^eFalconer decif. 94.

4. Can the heir of a marriage insist against his father for the provisions in a contract of marriage.

It may be a question, Whether the presumptive heir in a land-estate, if he is the party's eldest son, is intitled to an aliment from his father, *Ex debito civili*, and may sue for a consideration upon that head? I conceive, that if the father has the estate in fee-simple, he cannot be bound to maintain such heir, otherwise than *Ex debito naturali*, in the same manner, as in respect to his other children, viz. during their minority, or other incapacity to support themselves; and that an offer to receive him into the family is sufficient, which is their case, as I have set forth elsewhere^f; because the father is then under no obligation as to the eldest son, touching the estate, but may freely give it to any of his children, or to a stranger, if he pleases. Indeed, where the estate is provided by contract to the heir of a marriage, such heir would seem intitled to an aliment, during his father's life; after a similar manner, as a fiar is from the liferenter; and, for the like reason, viz. to save the fee of the estate from being exhausted by the presumptive heir's debts, necessarily contracted during his father's life^g.

^fB. 1. tit. 6. § 13, &c.

5. How far the presumptive heir intitled to an aliment against his father.

BUT regularly the character of Heir only takes place after the ancestor's death; in which sense an heir is one, Who is in capacity to be, or actually is an universal successor to the deceased; or, as the civil law has it, *Qui in universum jus, quod defunctus habuit, succedit*^h, one who succeeds into the whole right of the deceased. But there being different kinds of heirs with us, it may be doubted, if all of them can be termed Universal Successors. The character, in the properest sense, agrees only indeed to the heir of line, who is called Heir-general, and Heir at Law, and is primarily and directly, when served, liable to all the debts and deeds of the ancestor, except where he enters upon inventory. Heirs-male, and of conquest, are likewise liable universally,

^gArg. Jan. 31. Feb. 19. 1734. Moncrief, Var. on Appeal.

^hL. 62. ff. de reg. juris.

6. Heirs, how understood universal successors to the deceased.

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universally, after discussing the heir of line. And heirs-portioners are universal successors, according to their proportions of the succession. How far heirs of provision, or of entail, can be deemed such, shall be hereafter shown.

7. An apparent heir has annum deliberandi, or year and day for deliberating; and may sue exhibition ad deliberandum; how such action excluded.

AN appearand or apparent heir is The person upon whom the succession devolves, before he enters, by making up a right to the subjects succeeded to. The heir has an year and day to deliberate, whether he shall enter or not, termed *Annus deliberandi*; and, at any time before his entry, tho', after the year of deliberation, he is intitled to pursue actions of exhibition *Ad deliberandum*, for inspection of the writings, concerning the heritage, or which may affect the same, in order that he may determine himself, whether he shall enter, or abstain. I have discoursed upon this privilege in the preceeding title, and shall only remark here, in the first place, that this action is competent against all persons, as well strangers, as those of the ancestor's family, to exhibit all writings granted by, or to the deceased, whereby the estate may be affected or relieved, and that whether infestment followed on them or not^a. Next, that this action will be excluded, by the defender's producing an absolute right, denuding the predecessor of the estate, whereto the pursuer pretends a right of apparency; for thereby his right of succession to that estate is cut off. And, if he has any thing to object to such disposition, as, That it was granted on death-bed, or that the deceased had not power to grant it, he must intent a reduction, as in the common case, to set it aside. But, if the pursuer is apparent heir-general, he may, notwithstanding such disposition, oblige the defender to exhibit on oath all rights in relation to other subjects, besides these conveyed, to which his title of succession extends, or even rights which may have disabled the predecessor from disposing the estate in question. The heir's being entered naturally excludes him from this action, which is only in order to deliberate, whether he shall enter or not; so that, after he is heir served, he can only sue an ordinary exhibition, libelling, or setting forth a proper interest in the subject.

^aBruce decis. 112.

8. An apparent heir may defend his ancestor's rights; how far intitled to uplift the rents.

AN apparent heir, in the investiture, hath likewise interest to defend against any action at law, whereby the predecessor's rights are challenged; and may continue the ancestor's possession, notwithstanding a deed settling the estate upon another^b. And he may uplift the rents, and enjoy the same, and during his life, the rents are affectable for his debts. Upon his death, such as then were due may seem to fall to his executors; but the case is otherwise, for, tho' an apparent heir may receive and enjoy the rents voluntarily paid by the tenants, and so is allowed to possess, because he has it in his power to make up a competent title to the same, and to the estate itself, by a service; yet, he dying in his apparency, the rents unuplifted follow the right of the estate, and fall to the next heir; so that the deceased's executor can no more claim the bygone rents, than his heir can the estate^c.

^bFount. June 24. 1698. Home. Hume (heir apparent) July 18. 1727. Ogilvie.

^cFeb. 19. 1633. Oliphant. Harcus (heirs) March 1685. Wedderburn. Gilm. decis. 94. ^dJuly 17. 1671. Boid.

9. How far apparent heirs have right to tacks.

TACKS and rentals belong to the tacksmen's heir, without any service^d; but any assignation he grants of the tack will only subsist during the granter's life, so that a service is necessary toward a perfect

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fect conveyance of tacks, assignable. The heir's continuing to possess on such tack, will subject him to a passive title of behaviour as heir^a.

^a Spotf. verb. (heirs) p. 135.

It is likewise the privilege of an apparent heir to claim an aliment from the liferenter of lands and heritage, whereof I have spoken in another place^b, and shall add what further occurs. A liferenter, by reservation, is not liable in an aliment to the fiar, otherwise than as he would, before denuding of the fee; for, it can only take place, where others have a liferent from the fiar, in favour of his heir^c.

^b Digref. § 2. b. 1. p. 157.

^c July 7. 1629. Hamilton. July 21. 1636. Rammorney. Hume (aliment) p. 30. Jan. 1729. Hay.]

THIS privilege of the heir against the liferenter of lands was originally introduced by an extension of the statute 1491, which puts the wardatar and liferenter of lands on an equal foot, as to finding caution to leave them in the same condition as at their entry; and was construed to put them in the same case, as to the aliment of the heir. But the subsequent statute, which explains that act doubtfully conceived, and enforces it against both the superior and liferenter, as to the finding surety to preserve the subject, is silent as to the aliment of the heir^d. Whence the natural construction seemed to be, that the liferenter was not liable to it, especially considering, that the reason of the disparity is obvious. The ward-superior possessed the lands by a casualty, which originally subjected him not only to the aliment of the heir, but likewise to account for the rents, as a guardian or tutor^e. And, tho' the recenter law came afterwards to be more favourable to the superior, it was just that the antient law should be revived, in respect of the aliment of the heir. But what concern had the liferenter in that matter, who is in the same case, as onerous creditors infect? And Sir George Mackenzie, in his observations upon the first mentioned act, brings various other reasons, why this construction ought never to have been put upon the same. But the point is established by variety of precedents. However, the court is far from regarding it as a favourable claim; and therefore, if, at the time the liferent took place, there was sufficient for the heir's aliment, without encroaching upon the widow's liferent, the debts or deeds of the heir, whereby the rents of the estate were exhausted, was not found any ground, after such heir's death, for giving an aliment to the next heir, tho' the estate was over-burthened at his accession to the same^f. And the diversity is obvious; the wife takes her chance, as to her husband, for better and worse; so that if, by his debts, there be occasion for an aliment from her to the heir, she must submit; but she has no concern with the debts or deeds of the heir, so as these should make way for encroaching upon her liferent, for an aliment to the succeeding one, more than to the first heir, after he has over-burthened the estate. And if there was an aliment claimable from one who had part of the estate in ward, there could have been no access against the liferenter; for then there was no reason for encroaching on the liferent, by the constructive sense of the statute.

^d P. 1535. c. 15.

^e Reg. maj. lib. 2. c. 42.

^f Newt. decis. 21. Feb. 21 1751. Auchinleck.

10. How far aliment due to the heir by a liferenter.

11. Such aliment not due to the succeeding heir, if the estate is exhausted by the debts and deeds of the first heir; or if there was an aliment claimable from the superior.

It is competent to an apparent heir to reduce deeds granted by the ancestor on death-bed, affecting the estate; because frequently such deeds entirely bar his entry, as where the deceased granted a total disposition of the estate, which, tho' on death-bed, divests him till

12. An apparent heir may insist to reduce deeds on death-bed to his prejudice.

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it is set aside. But, at the same time, the heir's entry which may take place, where the deceased was not totally denuded, will not exclude him from reducing deeds on death-bed to his prejudice; for it is in the character of Heir that he insists. Nor is he liable in any warrandice on account of such deeds, as above. I shall add no further to what I said on this head in the preceeding title.

13. The apparent heir, by possession, vests himself with the heirship-moveable.

I shall in the last place observe, that the apparent heir at law, intitled to heirship-moveable, may vest himself with the right, by assuming possession of the same, without service; as the nearest of kin makes up a title to the other moveables by possession, without confirmation, as shall appear when I discourse of executory.

SECTION II. *Entry of Heirs, by a General Service.*

14. A general service. Heirs of all kinds may be served in that manner.

BUT the most important interests of heirs arise from their being served heirs, which gives them an Active title, as indeed it subjects them to the predecessor's debts, and so is likewise a Passive title. A service of an heir is either General, without reference to any subject wherein the ancestor died infest, or even to any particular subject whatever; or Special, for making up a title to lands, annualrents or tithes, wherein he stood infest. Not only heirs of line, who are the right heirs, or heirs at law, and therefore General heirs in the most proper sense, but likewise heirs of conquest, and heirs-male may be served Such by a general service. Heirs of tailie and provision in rights whereon infestment did not follow in the deceased's person, must also be served by a general service relating thereto. The heir of line is served *simply* nearest and lawful heir, the others, with the addition of particular characters of nearest and lawful heir-male, of conquest, tailie or provision. A general service of an heir of line, which bears no reference to any particular subject or right, may take place, where nothing is carried thereby; and nevertheless, it infers an universal representation of the deceased; for, *Hæreditas in jure consistit* ^a.

15. Heirs of line, properly heirs at law; heirs of conquest may be deemed such, all others, heirs of provision.

HEIRS of line are properly heirs at law, as succeeding by the act of the law, who are Persons of a certain relation to the deceased, called to the succession by right of blood, and so are *hæredes nati*. All others may be deemed provisional heirs, or heirs of provision, and are in a manner *hæredes facti*. Thus, heirs-male succeed in lands, whereof the investiture is to heirs-male. Heirs of conquest likewise inherit subjects, by the provision of the party, where conquest, during the marriage, is provided to heirs. Indeed, in the legal succession to a middle brother, an heir of conquest, who is the immediate elder brother, is an heir at law; because he succeeds by act of the law, without any destination of the party succeeded to: and, tho' he is distinguished from the heir of line, *viz.* the immediate younger brother who inherits heirship-moveable, and other subjects, yet both are heirs at law to the deceased. But the heir of line, in such case, is understood primarily to be vested with the character of Heir at law, as being preferably liable to the debts; so that, till he is discaft, the heir of conquest cannot be reached, and in that respect an heir of conquest may be regarded as an heir of provision. But, more properly,

^a § 2. inst. de reb. corp. et incorp.

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perly, heirs of provision are such as succeed to particular subjects by the deed of the immediate or remoter ancestor; or generally to all, or a share of one's conquest during his marriage, as is frequent in contracts of marriage.

A GENERAL service, as likewise the special, proceeds upon a brieve taken out of the chancery, which is a precept from the king, commanding the judge ordinary, to whom it is directed, to inquire by a jury or inquest, *Per probos et fideles homines patriæ*; which originally seems to have meant the *Pares curiæ*, the vassals being commonly termed *Fideles homines*; but now, and long since, it is understood only of a jury of 15 men. The subject of the inquiry is, in the first place, *If the ancestor died at the faith and peace of our sovereign*; and secondly, *If the user of the brieve is the nearest and lawful heir to him*. There is only one form of brieve, conceived of a tenor, as if designed for a special service. But, in the general service, answer is only returned to the foresaid two heads of the brieve, without regarding the particulars in it that refer to lands; and, in order to this, the heir's claim is formed, only relating to the foresaid two heads of the brieve.

16. The brieve for a general service; there are only two heads in it.

THIS brieve may be directed to any judge ordinary, or magistrates of royal borows, tho' the deceased lived not within their jurisdiction, and tho' the heir reside not there. It must be executed at the market-cross of the head-borow of the shire, where the service is to be expedited, 15 days before the day of the service. The heir presents the brieve, and executions to the judge of the service, and the executions must be verified upon oath by the messenger and witnesses. And thereafter the heir produces his claim before the judge and inquest, setting forth therein his relation or propinquity to the ancestor, and craving, that the foresaid points of the brieve may be put to the knowledge of an inquest, and that he may be served heir to the deceased accordingly. The inquest consists of 15 persons, sworn to return a true verdict; they need not be cited, but any persons present may be required to pass on the inquest^a: tho' it was provided by an old statute^b, that the inquest should consist of the most sufficient and worthy persons within the jurisdiction, summoned on 15 days for that purpose.

17. Such brieve may be directed to any judge ordinary, or magistrate; procedure in it.

THE claimant must prove his propinquity before the inquest, in answer to that point of the brieve, *viz.* That he is nearest and lawful heir; this must be done either by witnesses, that he is reputed of such relation to the deceased, or by writings inferring it. As to the other point, that the ancestor died *At the faith and peace of our sovereign*, it is presumed, and needs no proof; for it resolves into this negative, *That he was not rebel*; but a civil rebellion is not here regarded^c. And, as to the ancestor's death, it must be proved, if controverted, which can only be when he resided abroad; for, if he lived and died in this country, his death will be held as Notorious.

18. How far the heads of the brieve want to be proved.

THE service is "The verdict or sentence of the inquest, Affirmative in favour of the claimant." It must be subscribed by the clerk and the chancellor, or foreman of the inquest, and as many more of the inquest as please. It is attested by the judge, and according to the king's

19. A service either affirmative or negative; this last improperly called a Service.

^a P. 1403.
^c 94.
^b Stat. Rob.
III. c. 1.

^c Nov. 21.
1626. Seaton.

king's command, at the end of the brieve, retoured, or returned to the chancery, and there recorded, as the answer to the points of the brieve, whence it is termed a Retour. The service may be returned after the death of the party served, as being in effect only a recording it; tho' it is regular, that the service should be retoured in his life; nor can it vest the party with any actual title till it is retoured^a. If the verdict is Negative, it is properly no service, and consequently is not retoured; but it must be removed by reduction, before the party can proceed to serve anew, and is called a Negative Service, not without some impropriety.

^a Fount.
Feb. 2. 1698.
MacIntosh.

20. A general service is included in a special service of the same kind or quality.

A SPECIAL service, bearing That one is nearest and lawful heir of line, of conquest, or male, to the deceased, in any particular subject, necessarily supposes, that he is nearest heir of line, conquest, or heir-male in general, to the deceased. Whence, it is justly esteemed a maxim, That a special service includes, by necessary implication, a general one of the same kind^b. And it was already observed, that the tenor of all brieves relates to a special service in lands, and that a general service is, where answer is returned only to the foresaid two first heads of the brieve; so that, from the order of procedure, a general must be included in a special service.

^b Feb. 9.
1676. Drummond.

21. What subjects carried by a general service; it effectually vests the right, which a special service does not.

NOT only heirship-moveable, and bonds secluding executors, but likewise heritable rights, whereon infeftment did not follow, are conveyed by a general service; which fully carries and states the right in the heir's person, that was in the deceased, in such manner, that tho' he die before he perfect the right in his own person, by infeftment, the next heir must serve to him^c. Whereas, in a special service, the heir's retour evanishes by his death, unless he is likewise infeft; because it is only the infeftment that denudes the deceased, and consequently the right is still *In hæreditate jacente defuncti*, in the inheritance of the ancestor, not taken up, till one is infeft as heir to him therein, or has otherwise made up a title in his person thereto. And this is the case of infeftments of annualrents, tho' containing obligation to pay the principal sum, That a general service, whether apart, or implied in the special, will not carry even that obligation, unless infeftment follow in the heir's person; for the personal obligation is inherent to, and cannot be separated from the real right which secures it, and is the most pregnant^d.

^c Spotf. verbo (heirs) p. 144. in fine.

^d Jan. 1729.
lo. Halkerton.

22. A general service, when necessary to heirs of provision.

A GENERAL service (as was above observed) is frequently necessary to heirs of provision, in subjects whereon infeftment did not follow in the deceased's life, and then it carries only that special right. But a service is not necessary where the right is taken "to one, and, failing of him by decease, to another specially named^e;" for then there can be no doubt of the person's right, and he is a conditional fiar, viz. in case the party first named do not otherwise dispose of the subject, which he may. But if it is "to the acquirer and the heirs of his body, whom failing, to the other," he wants a service to shew that the heirs of the first's body have failed^f. A general service of one, as heir of provision in a clause of conquest in a contract of marriage, is necessary, and carries all that falls under that clause; but which must be afterwards ascertained, as to the particulars, by proper

^e July 23.
1675. Lammington.

^f Hume (provision to heirs, &c.)
June 1733.
Monro.

per

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^a Fount. Dec.
7. 1697.
Cuming.
Hume ibid.
Feb. 4. 1726.
Gibson.
^b Hume ibid.
Feb. 3. 1732.
Campbel.

per actions against those to whom the same descend, whether heirs or executors at law to the deceased, according to the nature of the several subjects, in order to denude them. But if the provision of conquest is to the children of marriage, they have right to it, and transmit the same without any service^a; because the right of the obligation is in them. The case is the same where one, in his contract of marriage, becomes bound to pay certain sums of money to the children of the marriage^b. But if, by the contract, the rights are only to be taken by the father, "To himself and the heirs of the marriage," he still remains fiar, even after the rights are taken in terms of the contract; and the children of the marriage must be served heirs of provision to him, whether in a special subject, or a general provision of conquest. And consequently they, in their due order, are liable to the necessary, onerous, or rational deeds of the father, to the extent of those subjects, but not to merely gratuitous.

CONQUEST is not here understood as in the question between an heir of line and of conquest. But all is conquest which is provided by the clause, if acquired during the marriage; whether rights whereon infeftment could follow or not: and sometimes it comprehends rights to which the father shall succeed; but these last, unless specially expressed, do not fall under a clause of conquest, which requires that the subjects be purchased or acquired. Gratuitous rights granted to the father are in the same case, and are not comprehended in the clause of conquest, unless it appear to have been so intended by the parties; for otherwise Conquest, from *Questus*, is only that which is acquired by one's industry. It is understood to be what one is worth by onerous acquisitions, or by improving his estate during the marriage, (all debts being deduced) more at the dissolution of it, than he was worth at its commencement; but he being fiar, has nevertheless a rational power, even after the dissolution of the marriage, to make use of his own during his life. I had occasion to take notice of such clause elsewhere^c.

23. What understood conquest in such provision.

^c B. I. tit. 5. sect. 1.

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WHEN infeftment has followed upon the right in the deceased's person, then the heir commonly makes up a title to it by special service. This proceeds by a brieve out of the chancery, the same with the brieve in the general service, and is an answer or return by the jury to all the particulars or heads of the brieve. It must of course be directed to the judge-ordinary of the place where the lands, tithes, or annualrents lie, unless in default of him, or upon other special considerations, on a warrant from the lords of session, it is directed to others. This is frequently done to the macers before the court of session; or, upon advocating the brieve, the same is remitted to them by the lords, who name one or two of themselves assessors, (if the parties desire it) and for most part discuss the competition on report from the assessors; or on a hearing in presence, and the parties repeat declarators of their respective rights, in order to a final decision of the question. This brieve must be executed and prosecuted in the same manner as in a general service; and parties having interest will be allowed to object against the service, but must instant-

24. The special service and procedure therein.

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ly verify their objections^a; unless they have likewise brieves for serving themselves heirs to the deceased in the same subjects; for then both parties will be allowed a term, and diligence for bringing in witnesses, or recovering writings to prove their propinquity, and their respective objections. After the proof is concluded, the inquest proceeds to cognosce, If the pursuers of the brieves, or which of them, shall be served. This depends upon the party's satisfying the heads of the brieve, and, in competition, he who proves most pregnantly his propinquity is preferred. But sometimes the propinquity is so involved, and there is such contradiction or obscurity in the proof, that the inquest returns a Negative Verdict to both.

^a P. 1505.
c. 94.

25. What if one suspect that a service may be surreptitiously carried on to his prejudice.

If a party, having interest to claim the succession, suspect that a service may be surreptitiously carried on, he may, on application to the court of session, obtain an Injunction to the director of the chancery to issue out no brieves for serving any person heir to the deceased, otherwise than on previously giving notice to the supplicant, and the brieve must set forth the same accordingly^b.

^b Spotsw.
(brieves)
MacCulloch.

26. The claim in a special service; the last infestment must shew to what heirs the lands are provided.

In the claim for a general service, the claimant takes only notice of the forementioned two heads of the brieve, and the inquest only cognosce thereon, without regarding whether the deceased was infest in any lands or not. Whereas the claim for a special service sets forth, That the predecessor died last infest in such lands, and, That the claimant is nearest and lawful heir to him therein, which corresponds to the heads of the brieve to that purpose. Wherefore, as to the first two heads in the special service, they are the same as in the general, with an addition of what lands the predecessor died vest and seised in, and that the claimant is nearest and lawful heir to him therein. The ancestor's infestment must be produced, to shew that he was vest and seised in the subject, and it will be presumed that his right continued till his death; unless some party interested compare and prove that he was denuded; and he will likewise be presumed the last infest, if the contrary is not instructed.

27. Rights to heirs whatsoever generally go to heirs of line, but sometimes it is otherwise.

RIGHTS taken to one, and his Heirs Whatsoever, generally import heirs of line; but sometimes it is otherwise, from the presumed intention of the party. Thus, if one standing infest in the superiority of lands, destinated to his Heirs-male, purchase the property to himself and his heirs Whatsoever, the same will go to his heirs-male; and the like will hold as to the purchase of tithes or other collateral rights, which, tho' to heirs whatsoever, will go to the heirs in the principal subject^c.

^c Dalr. Nov.
16. 1698.
Hay. Hume
(succession)
Jan. 1727.
marquis of
Clydesdale.

28. The import of the clause in the brieve, that the deceased died at the faith and peace of the king.

THE article of the brieve, That the deceased died *at the peace and faith of the king*, (which, as was said, is likewise presumed) excludes all serving to one that died attainted of treason, or a foreigner not naturalized; for aliens are under allegiance to a foreign prince or state; and persons, who had traiterously broke their faith and allegiance, cannot be said to have died At the faith and peace of our sovereign. But this concerns not other crimes; for tho' such are a breach of the king's peace, yet they do not violate one's allegiance, nor infer forfeiture of lands and heritages, or corruption of blood, with us.

It

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^a Nov. 21.
1626. Sea-
ton.

It extends not to civil rebellion by denunciation, tho', according to the strict meaning of the words, that may be comprehended, and was of old doubted^a, but without ground; because truly it does not affect the right of fee, concerning which the only question in a special service occurs.

If the pursuer of the brieve prove such propinquity to the deceased, tho' ever so remote, as intitles one to the succession in the subject, conform to the claim, it is sufficient to infer that he is the Nearest heir; unless compearance is made for a nearer that offers to serve. Wherefore any relation to the ancestor, by lawful descent, other than on the part of his mother, is sufficient to intitle the claimant to succeed to him in his estate. On this head the claimer must prove likewise, by the rights, that the subjects in question go to such heirs in favour of whom the brieve is issued, and as he sets forth in his claim. If no particular destination is in the rights, they must go to heirs whatsoever, or heirs of line, who are heirs at law, as they are justly termed, and the presumption of law therefore, in doubtful cases, is in favour of the lineal heir. All objections may be moved by any person having interest, against the service. Dilatory objections are those against the brieve, as to the formality of its executions, or the like; but peremptory objections are such as bar the pursuer's title to serve, as that he is a bastard, &c.

29. Any propinquity intitling to succession sufficient; in a doubtful case, the lands presumed to go to heirs at law.

^b P. 1594.
c. 222.

It is an objection with us, by special statute, founded in nature, That where one slays his parent, whether immediate or remoter, and is thereof convicted, he and his issue is disinherited from the deceased's lands, heritage, tacks and possessions^b. This unnatural crime of Parricide is thus justly punished. But the case is farther extended by the civil law; for any person that murdered another was disabled from succeeding to the person murdered, as being unworthy to reap benefit by his own crime; and the subject of the succession, of which he rendered himself unworthy, was adjudged to the fisk; and, if he was slain by another, the heir was bound to prosecute the murderer, upon pain of losing the succession likewise to the fisk^c. The succession however with us, in the case of parricide, goes to the next heir, and not to the fisk, as it was with the Romans. Not only the slayer, but all his issue, is excluded from succession to the parent killed. But the objection is not good, unless he was attainted of the parricide: for a decree of fugitation, for not appearing to undergo a trial, will not be sustained, in order to bar him from the succession. The act only excludes the slayer from "Succession to lands and heritages, tacks and possessions;" so that he may carry these subjects by singular titles, and the moveables even as nearest of kin. But if the eldest son, who commits parricide, have a gratuitous disposition from the ancestor to his estate, it should seem to fall within the statute, as being *Præceptio hæreditatis*, which is understood a succession.

30. One guilty of parricide cannot serve heir to the deceased, if attainted of the crime; it is no bar to succession in moveables.

^c L. 15.
§ fin. ff. ad
Sctm. Silani-
an.

^d Sup. tit. 3.
tit. 4.

I HAVE already observed the disabilities that incapacitate persons from being heirs, as likewise those that concern the deceased, that he could not have an heir, as being a bastard, alien or rebel, or being denuded of the fee^d. All which may be objected by donataries to the pretended escheats, on account of such character of the deceased,

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ed, or by others appearing for their interests, as being disponees to the estate, and they must have their rights in their hands ; for they will not be allowed terms for proving, this not being a pleadable brieve ; but reduction will be reserved, as accords, unless in the case of competing brieves, as was just remarked.

31. The third and fourth heads of the brieve.

THE remanent heads of the brieve only concern the superior's interest. The third is, *Of whom the fee was holden* : this must be instructed from the ancestor's infestment. The fourth, *By what service the fee is holden*, relates to the manner of holding, and must likewise appear from the infestment ; but if not, it was formerly presumed ward, as the most antient and most agreeable to feudal rights. But now, by the late act ^a, the tenure must be esteemed blench in holdings of the crown ; and feu in these holden of subjects, where an annual duty is payable, tho' not in name of feu-farm.

^a 20 Geo. II.

32. The old and new extent; the old extent, how far a qualification to vote in the election of a member of parliament.

THE fifth head is, *What the fee is worth now, and was worth the time of peace* ? this concerns the old and new Extents or Retours. By what the fee is Now worth is meant the new retour, which regulates the relief and non-entry duties before declarator, and for which caution must be found to the sheriff, before he give seisin, upon a retour of lands holden of the crown. By, *What the fee was worth the time of peace*, is understood the old extent : this was a valuation put on the lands in Scotland of old, when we were at peace with England. It is from this that lands are called Penny, Merk, or Pound Lands. By it the land-tax was proportioned of old ^b. And by it the qualifications for electing members of parliament for counties are regulated in a great measure ; for those who have lands in the shire worth Three merks of old extent, holden of the king or prince, in property or superiority, are capable to elect, or be elected members for that shire ^c. Anciently the old extent concerned ward-lands only ; but, by special statute afterwards, all feu-lands were ordained to be retoured and availed to merk or penny lands, and that in taxations the feus should be charged according to such retours of the same ^d. Hence the act 1681 requires, That the retour-duty in feu-lands be distinct from the feu-duty, in order to qualify one to elect or be elected a commissioner to the parliament. I shall have occasion afterwards to discourse fully on the election of members of parliament ^e.

^b P. 1597.
^c 281.
P. 1633. c. 1.

^e P. 1681.
^c 21.

^d P. 1594.
^c 233.

^e B. 4. tit. 1.

33. The old and new extents, why called retours; their origin.

BOTH old and new extents are called *Retour-Duties* ; because the extent or value of the lands, old and new, must be ascertained, and retoured to the chancery by the inquest, in the service of heirs, in answer to this head of the brieve ^f. These extents were the true avails or rents when the respective valuations were adjusted, or the surveys made. It is uncertain when the old extent was made out ; but, as to the new, the original of it is plain, from the act 1474, above referred to. This statute enjoins, " That, in time to come, it be answered in the brieve what the land was of avail of old (by which undoubtedly is meant *the old extent*) and the very avail that it is worth and gives at the day of serving the brieve." By this last, doubtless, is described the new extent, and which was the true rent the land was giving at the time of the statute ; and therefore the new valuation has been made immediately before that statute, and the form of expressing

^f P. 1474.
^c 55.

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expressing it hath for certain its rise from the statute's enjoining the retour to contain not only what the land was valued at *of Old*, but likewise what it is worth *Now* at the time of the service. And indeed in divers respects, particularly in the case of non-entry, the new retour is understood the true value of the land at the time of the service, at this day ^a.

^a Feb. 3.
1732. Campbell.

IN place of these extents in temporal lands there was a taxation of all the church-lands and benefices, by Bagimont the pope's legate in Scotland, in order to ascertain the rentals of the same; so that the pope, in conferring them, might know the true value thereof. This taxation was confirmed by divers statutes, and severe penalties imposed on those who should give information at the court of Rome of any higher taxation, or value of the benefices, than was contained in Bagimont's book ^b. And I conceive the non-entry in church-lands, and other casualties that are regulated by the retour duty in temporal lands, were ruled by that taxation in church-lands.

34. Bagimont's taxation of church-lands.

^b P. 1471.
c. 43.
P. 1493.
c. 39.

THERE is no mention in the brieve or service of the Valued rent; because the casualties of superiority were not thereby regulated: but now, by the late act ^c, the retour, as to certain holdings, must, besides the old and new extent, set forth the valuation of the lands, in respect that one pound Scots of the hundred of the valued rent is the rule for the non-entry duties in lands that were holden ward of his majesty, and are thereby converted to blench holdings. The valued rent is, however, the present rule for proportionating the cefs or land-tax, and other public burthens; and likewise for regulating qualifications of members of parliament, in lands, where the old extent does not appear, and four hundred pounds of valued rent is made answerable to a three merk land, or forty shilling land of old extent ^d. This last valuation of all the lands in Scotland was made in the rebellious times, by acts of the rescinded parliaments ^e, and this was further adjusted after the restoration of king Charles II. as appears from express statutes ^f; and made the rule for proportionating upon the several shires the supply or cefs imposed upon the landed interest, otherwise called the Land-tax, and has been observed ever since, as at present.

35. The valued rent, what; no mention of it in the service; it is the rule for proportionating the supply, and other public burthens; and in part for the qualifications of electors of members of parliament.

^d P. 1681.
c. 21.
^e P. 1640.
c. 34.
P. 1649.
c. 21.
^f P. 1661.
g. 14. act of conven.
1667.
P. 1670. c. 3.

THE cefs or land-tax is termed the *Supply*; because what the excise laid upon malt, spirits, and other commodities, fell short of the 40,000 *l.* Sterling annuity, then granted to king Charles II. was to be made up and supplied by the shires and borows; and commissioners were appointed for regulating and collecting the supply accordingly ^g. Afterwards a supply was granted by the parliament, or convention of estates, to the king, by way of assessment upon the land, conform to the valued rents, independent of the excise, whence it was called the cefs ^h: and this was the rule always thereafter ⁱ, and is now established by the treaty of union ^k.

36. Why the cefs or land-tax termed the Supply.

^g P. 1661.
c. 14.

^h Acts of conv. 4. Aug. 1665. June 23. 1667.
P. 1670.
c. 3.
ⁱ P. 1690.
c. 6.
^k P. 1707.
c. 7. art. 9.

BUT to return to the remanent heads of the brieve. The sixth is, *If the pursuer is of lawful age*: it concerned only ward-holdings; for, till the ward ended, which in men was at 21 years of age, and at 14 in women, the fee was in the superior's hands; and therefore the heir

37. The sixth head of the brieve, if the pursuer is of lawful age; no use for it at present.

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heir could not regularly enter without a dispensation, and his entry by dispensation did not cut off the superior from the benefit of the ward-duty. In other fees any age is lawful, and it would seem that, in taxt-ward lands, the heir, tho' minor, might have entred; because the superior had no right to possess. And now ward-holdings being taken away by the foresaid late act, there is no farther use for this head of the brieve; since the heir, of whatever age, even tho' an infant, may be entred to the fee, in his minority, being duly authorised by tutors or curators.

38. The seventh head of the brieve, in whose hands the fee is.

THE seventh and last head, *In whose hands the fee is at present, or hath been since the ancestor's death*, serves to know if the fee hath been in non-entry, and how long; for it may be excluded by a liferent consented to by the superior, or established by law.

39. Retours, and procedure thereon, in order to the heir's being infeft.

IF these points are instructed to the inquest, they serve *Affirmative*, and the special service is returned to the chancery whence the brieve proceeded, the extract whereof is termed a *Retour*, as was said of the general service. Lords of regality, that kept chapels or chanceries, issued precepts, directed to their own bailies, for serving persons heirs in lands lying within their territories. The service proceeded in the same manner as before other judges ordinary, and was recorded in the books of the regality, whereout an extract was sufficient, in place of a retour to the king's chancery in other cases^a. But now, regalities being extinguished, there can be no place for such services, which must be carried on before the respective sheriffs, as in other lands. When the service is retoured, or returned to the chancery, precepts, in the king's name, are granted of course, by the director of the chancery; if the lands hold of the crown, to the sheriff of the shire where the lands lie, commanding him to give infeftment to the person retoured; upon his granting security for the non-entry duties and relief, and the sheriff, for his labour, is intitled to a recompence, called a Seisin-Ox, except in lands that formerly held of the bishop, and now of the crown, of 200 l. Scots of valued rent or under, for which no seisin-ox is due^b. It is so called, because, in antient times, fees for such kind of office were paid in cattle, but thereafter it came to be compounded for money, as the parties can agree. If the sheriff disobeys, or if there is no sheriff for the time, the lords of session will grant warrant to the director of the chancery to issue out a precept to others constituted sheriffs in that part^c.

^a Decem. 8. 1631. Clieffh.

^b P. 1690. c. 32.

^c Act of sed. Feb. 15. 1678.

40. The effect of the heir's seisin not registred.

THE heir being duly infeft, and his seisin recorded, is fully vested in the fee of the lands; but tho' the infeftment be not registred, the next heir cannot regularly pass him by, and serve heir to the remoter ancestor, whose seisin was duly recorded; because an unregistred seisin is good in a question among heirs. But if the heir, who thus passes by, sell the lands, the purchaser from him is safe; for, in terms of the statute 1617, he was only bound to take notice of registred seisins, and therefore the infeftment of the deceased heir, not recorded, is void as to him^d.

^d June 30. 1705. Keith. Nov. 29. 1705. the creditors of Paterfon.

41. How the subject superior compels

IF the lands hold of a subject, by the former course, a precept was issued from the chancery upon the retour, commanding the superior to

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to receive the heir retoured; and, if he disobeyed, an instrument being taken thereon, and produced to the director of the chancery, a new precept was given, still urging the superior to enter the heir. This likewise being disobeyed, a third precept was issued, commanding the superior to enter the heir, with certification, that, if he refused, he should lose the superiority for his life. This last being disobeyed, and instruments taken thereon, a precept was issued against the next superior of the immediate superior, commanding him to receive the heir: and the same course was followed with him, and all the other intermediate superiors, till arrival at the crown. In which case the heir, on a petition to the court of session, obtained a warrant to the director of the chancery to issue a precept of seisin, directed to the sheriff of the county where the lands lay, commanding him forthwith to infest the heir, which, at last, by this long course of process, was accomplished. One of the foresaid three precepts must have been intimated to the superior personally, but the rest might have been executed at his dwelling-house: in this case the superior, by reason of his contempt and disobedience to the king's precept and command, lost the superiority, during his life. This tedious and expensive method is now rectified by the late statute^a, for by it the heir may forthwith, on production of his special retour, obtain warrant for letters of horning, to charge the superior to receive him, on tender of the non-entry duties and relief, and proceed in all diligence against him for that effect.

^a 20 Geo. II.
c. 50.

If the superior himself is not entered, he must be charged by letters of special charge, at the instance of the heir retoured, to enter himself in the superiority, within 40 days of the charge, and receive the vassal, with certification, That, if he refuse, he shall lose the superiority for his life, and be liable to all the heir's damages, and that the king, or next superior, shall enter the vassal retoured^b. This charge being disobeyed, the vassal may pursue a declarator against his immediate superior, That he has lost the superiority during his life, and conclude against the next superior, or director of the chancery, to grant precept for infesting him; and this course does not require any previous charge against the mediate superior^c. I conceive this to be the only proper method at this day to be followed, when the heir in the superiority is not entered; for then a charge against him to receive the vassal is inept, since his compliance with it could have no effect.

^b P. 1474.
c. 57.

^c July 29.
1624. Ca-
prington.

able to enter the heir retoured in special, and the effect of his disobeying the charges to that purpose.

42. What if the superior himself is not infest.

THE superior disobeying must suspend the charge, if he resolve not to incur the certification, as to the loss of the superiority for his life. The only good ground of suspension is, That the vassal has not paid the non-entry duties, and the relief, nor tendered them. This is founded in the nature of the thing, and the express tenor of the precept, which bears a quality in favour of the superior, *Faciendo tibi quod de jure facere debet*, i. e. the vassal's performing all that is incumbent on him by law to the superior. This is meant of the non-entry duties and relief, before payment whereof, the superior is not bound to receive the heir; tho' his granting a precept of seisin, in consequence of such charge, would not presume these were paid, that being an act of obedience. If the heir refuse to show the predecessor's holding,

43. On what grounds may a superior refuse to enter the heir.

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holding, in order to the making out a precept conform thereto, it will, from the nature of the thing, be a good ground for suspending the charge. The loss of superiority, if incurred, comprehends all such non-entry duties, as may thereafter fall, during the superior's life; but all the other casualties that may happen, and the feu-duties, belong to himself; because, in respect to these, he is not culpable; and he is still the real superior.

44. The powers competent to the mediate superior who supplies the vice; the heir's case, upon the immediate superior's refusal to enter him.

THE superior, who, in this case, supplies the vice, or serves the turn, is not truly superior; and therefore, he could not, in prejudice of the immediate superior, accept of a resignation from the sub-vassal in favour of another, whereby a stranger would be obtruded to the immediate superior: provided the immediate superior is infest; for otherwise the mediate superior, of whom the vassal holds, as supplying the vice, must be applied to, in order to receive the purchaser in terms of the late act^a, for completing his right. And much less would a resignation *ad remanentiam*, in the mediate superior's hands, consolidate the fee with the superiority. All which shew, that he is only a vice-superior, by entering the vassal for that time, but is no farther considered as superior. Wherefore the damage of the immediate superior is the same, whether the vassal applies to the next superior, and gets himself entered or not; for, truly the vassal must be considered as entered, in respect to the superior, who without cause refused to receive him; and it is that refusal, and not the vassal's applying to the next superior to be received, that makes the superior incur the tinsel or loss of the superiority during his life.

^a 20 Geo. II. c. 50.

45. What incumbent on the sub-vassal before he be received.

THE mediate superior is not however bound to enter the vassal till payment of the relief; for, *Præstat officium*, he enters the heir, and relieves the fee out of the immediate superior's hands; and, for the same reason, he is intitled to the seisin-ox: and an eminent lawier is of opinion, he has right to no more^b. But he cannot claim the bygone non-entry duties to which he has no right, not being the proper superior, and such as incurred after the disobedience of the immediate superior are not exigible, for the reason above assigned. But, if the immediate superior was in non-entry, the sub-vassal, applying to the mediate superior for an entry, is bound to pay the whole non-entry duties owing by his immediate superior, in whose place he comes; because otherwise the mediate superior's case would be made worse, by the change of the vassal; for he could not be bound to receive his immediate vassal superior to the sub-vassal, without getting payment of all the bygone non-entry duties^c; but then the vassal is intitled to be reimbursed by his immediate superior of the non-entry duties so paid for him.

^b Hope pract. obser. tit. 4. § 15.

^c July 29. 1624. Ca-prington.

46. Special service must be to the fiar of the sub-ject; who understood fiar in provisions to husband and wife, in conjunct fee and liferent,

IN the entry of heirs, it must be adverted, whether the predecessor, to whom the service is craved, was truly fiar. This happens to be doubtful, where rights are taken, To husband and wife in conjunct fee and liferent, and to the heirs of the marriage. To know where the fee is lodged, the following rules may be of use, 1. The husband is presumed fiar, and the wife only liferenter, in heritable rights, the pre-eminence of the sex making way for this presumption^d. But, in moveable goods, or sums provided To a man and his wife, and their heirs,

^d Jan. 23. 1668. Justice. Feb. 2. 1632. Bartilmo. June 24. 1663. Fliz. Scrimzeour.

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^a June 22.
1739. Fergu-
son.

^b Jan. 29.
1639. Gra-
ham. July
12. 1671.
Gairns.

^c Feb. 20.
1667. Cran-
ston.

^d Dirl. decif.
144.

^e June 19.
1667. John-
ston.

^f Dirl. decif.
85.

^g Hume (fiar)
p. 303.
Nov. 25.
1735. Frog.
^h B. 2. tit. 6.
§ 8.

ⁱ Dec. 1729.
Claud Hamil-
ton.

heirs, without other termination, the same will go equally to the man and the wife, and their representatives; and, if it is taken, To the longest liver, the survivor, whether husband or wife, will have the whole^a. 2. Where an heritable right flows from the wife, or, on her part, she is presumed to be the fiar, and the husband only life-renter; unless it be contracted in name of portion with the wife; for then the husband, to whom the portion naturally belongs, is presumed fiar^b; if, from other circumstances, the fee does not appear to remain with the wife. 3. The person, to the heirs of whose body the destination is made, failing heirs of the marriage, is presumed fiar, tho', failing those, the last termination should be upon the heirs of the other; for the rule is, That the person is fiar, *Cujus hæredibus maxime providetur*, whose heirs are chiefly taken care of in the provision; now that is the one whose children are provided for, in the first place; and the heirs, in the last termination, are only heirs succedaneous to them^c. This likewise holds, where, failing issue of the first named, the heirs of the longest liver are substituted; for the fee cannot depend on the uncertain event of the longest liver, whose heirs are only heirs of provision to the fiar^d. Thus, in a right, To the man and wife, and the heirs betwixt them, which failing, to the heirs of the wife's body, which failing, to the heirs whatsoever of the longest liver; tho' the husband should happen to be the longest liver, the wife is fiar, since the right is provided to the heirs of her body in the first place, failing those of the marriage. But this rule is subject to an exception, *viz.* That, where a right is taken, To the husband and wife, and the heirs between them, which failing, to the heirs of the wife; if 'tis purchased by the husband's means, (which, in a doubtful case, is presumed) the husband is fiar; and the substitution of the wife's heirs will be understood a donation from him revokable^e. 4. In an heritable subject the husband is presumed fiar, where the right is taken, To him and the wife, and the heirs of the marriage, which failing, their heirs; the words, *Their heirs*, are understood the husband's, as, *Persona dignior*, in an heritable subject; since the fee of such must be presumed to be in the person of one of the spouses; and not to divide between them, which is the case of a right to moveables, so taken^f, as just said.

THOSE rules hold, tho' the rights to heritable subjects were taken, To the man and wife in liferent, and to the heirs to be procreate between them in fee, without any farther termination; for the children *nascituri* can only be heirs of provision, and the fee must be lodged in either the husband or wife; and the children, or other heirs, must serve heirs of provision to the fiar^g, as I have fully shewed in another place^h.

IF a provision is made of a land-estate, To *the heirs* of the marriage, or, To *heirs or bairns* of the marriage, it will be understood to them in their due order of succession; so that the eldest son would succeed as sole heir, and the lineal succession take place among themⁱ; unless another construction could be put upon it, from the circumstances of parties, or nature of the subject.

or other such provisions: rules for discerning who is fiar in these cases.

47. What if the right be taken to husband and wife in liferent, and to the heirs between them in fee.

48. Who heirs in provisions to heirs of a marriage, or to heirs or bairns, or simply to bairns or children of a marriage.

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IF a merchant or burges did provide certain houses to the children of a marriage, it was found, that they would all succeed equally as heirs of provision therein ^a. This was first determined as to burgal tenements, and in the case of merchants just referred to. But now it is established law, that land-estates, expressly provided, by any person, to bairns or children of a marriage, shall go to all of them equally, in the same manner ^b; unless a presumption from certain clauses in the deed arise in favour of the eldest son, as where a power is reserved to provide younger children, for that supposes the estate must go to the eldest son ^c.

^a Feb. 13.
and July 10.
1677. Car-
negy.

^b Jan. 29.
1678. Stew-
art. Fount.
Jan. 10.
1678. Kin-
loch.

^c D. decis.
Claud Hamil-
ton.

49. If one provide lands to heirs-male and female of a marriage, the females succeed only in defect of males.

IF one take a right of lands, To himself, and heirs-male and female of his body, the females cannot succeed, but in defect of males; because the party having used the legal term, (Heirs) it refers to the due course of succession by law. It would be otherwise, if the right had been taken to Children, for then both males and females would jointly inherit, according to the rule above laid down.

50. A provision of conquest to heirs, or heirs and children of a marriage.

WHERE a clause of conquest is conceived, not in favour Of *heirs or bairns*, but simply to the Children of the marriage, tho' it happen that the conquest is of heritable subjects, yet all the children are intitled to it; reserving to the father a rational power of administration and division among them. But he could not give it all to the eldest son, exclusive of the rest ^d, nor arbitrarily deprive any of them of a suitable portion. If the provision of conquest is to *Heirs*, or To *heirs and bairns* of a marriage, the heritable subjects will go to the eldest son, as heir of the marriage, properly so called, in respect to these, and the moveable sums and goods to the other children, who come under the description of heirs, as to such subjects.

^d Jan. 29.
1678. Stew-
arts.

51. A sum of money provided to heirs goes to all the children.

IF a sum of money is provided to Heirs of a marriage, the children are likewise, for the same reason, all equal sharers in it ^e, since they are all heirs in a moveable subject; and there is no reason to limit it to the eldest son, more than if a bond were taken in these terms.

^e Hume decis.
95. MacDon-
al.

52. Whether a provision to children of a marriage shall be limited to the eldest son, or extended to them all, frequently an arbitrary question.

THE primary design of such provisions in a contract of marriage is to secure them to the issue of the marriage, and that they may not be fraudulently disappointed by provisions in favour of children of another marriage, or otherwise. But it is frequently *Quæstio voluntatis, i.e.* a question touching the will of the party, whether the provision is to be limited to the eldest son, or extended to all the children; and the interpretation, in such cases, very much depends on the arbitrement of the court, upon advising the conception of the clause, and whole tenor of the contract, and circumstances of the parties.

53. Heirs of a marriage differently understood in a contract of marriage.

HEIRS of a marriage, in the proper sense, are such children as are to succeed to the father: as, where a man provides his land-estate, To himself, and the heirs of the marriage, or obliges himself, To secure sums of money to himself, and the heirs of the marriage, they can only take such provisions, on the death of their father who is fiar, and as heirs of provision to him. But, if he provide such sums Directly to the children, tho' under the designation of heirs of the marriage, and perhaps only payable at his death, yet the children, upon the dissolution

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diffolution of the marriage, by the wife's death, are intitled to those provisions, tho' they cannot exact them till after the father's death; and are considered only as heirs of provision, in respect to creditors of the father. But in all other views they are proper creditors; for, the diffolution of the marriage is the period at which such provisions to the children are to be deemed effectual; and the father's death is to be considered only as the term of payment, but not as if they were to be heirs to him therein^a. And all the cases, which are numerous, where it was found, that a provision to a wife, failing heirs of the marriage, takes place, tho' children existed, but died before the marriage dissolved, tend to establish this principle, as I had occasion to observe largely elsewhere^b.

^a Arg. decis.
June 21.
1672. Car-
negy.

^b B.1. tit. 11.
§ 73.

IF one dispone his land-estate To a son of a second marriage, and the heirs of his body; which failing, to his own other heirs; on the death of the son without issue, the person who is intitled by law to be next heir to the father will succeed to the son, without necessity to represent the father more than the son did; for, in many cases, the word *Heir* is understood *Designative* of the person capable to succeed, *Hæres potentia, et non actu*; and truly the succession to the son may devolve, when the father is still alive, and so could have no actual heir or successor at the time. Farther, in all cases, where one substitutes the heirs of a third person in the succession to his own estate, he is understood to call him, who, by law, may be heir to such person, and not to require an actual representation of him, it being only the representation of himself that he is taking care of, by such settlement, and by no means of the other person.

54. When one substitutes the heirs of another person's body, they are only understood heirs designative.

HEIRS of tailie or provision, by a personal deed, cannot be served heirs in special to the subjects provided to them, unless the rights were afterwards taken by the deceased to himself, and such heirs, and he thereon infest; for, if the rights of the lands are in favour of the deceased himself, and his heirs Whatsoever, the heirs whatsoever, or heirs of line, are the heirs of the investiture; and consequently they alone can be served in special thereto. But the heirs of tailie or provision, in such case, after serving heirs in general of provision, and thereby stating themselves in the personal right of the provision, or bond of tailie, must, in order to complete their right to the lands, insist against the heir of line, to infest himself as heir in the subjects, and denude in their favour; and a decree of constitution, or *cognitionis causa*, being obtained in such action, adjudication in implement will proceed in due course.

55. Heirs of tailie or provision, how do they complete their title, when the subjects are not taken in their favour, but to the heir of line.

IN the case of Ascendants, the father succeeds to his child who dies without issue, failing brothers and sisters of the child at the time the succession opens. And therefore, the law adjudging the inheritance to him, as the lineal successor to the child, in that case he may presently serve, tho' a nearer heir is in possibility, by his having lawful issue. Nor will he be thereafter bound to denude in favour of any child that shall supervene, because the succession devolved on him, and he has completed his right; *Et semel hæres semper hæres*. And, if it were otherwise, there could never be place for the succession of ascendants, because a man is still presumed capable to have issue. But,

56. If a father serve heir to his son, he is not bound to denude in favour of any child that afterwards supervenes; unless such child was in utero at the time.

if

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if there is a child actually conceived, then the father's serving to his decaest child must be suspended till the birth; for, in such case, *Qui in utero est, habetur pro jam nato*, a child in the womb is esteemed as born, in matters that concern the child's advantages. And, if the father serve in the mean time, the service becomes void by the birth of the child who was in the womb; and in that sense only I can understand a case, where, as reported by the collector, who sometimes is not very accurate, a different judgment seems to have been awarded^a.

^aForbes. Jan. 15. 1706. Watt.

57. Whether one serving nearest heir of tailie is bound to denude in favour of a nearer that afterwards supervene.

THE like question may occur in divers members of tailie, where, at the time when the succession opens, there is a nearer member of tailie in possibility; in which case, during such possibility, the court of session is not in use to suspend the service of the next member^b, because of the inconveniencies that might thence ensue. And whether he should be obliged to denude in favour of a nearer superveneing his service, depends on the nature and conception of the tailie, whence the intention of the maker may be inferred. But the natural presumption would seem to be, that he did not design a remoter branch should continue in the succession, while there was a nearer actually existent, tho' superveneing after the descent upon the remoter. In this case the tailie imports a *Fidecommis*, viz. that the remoter, who is served, is bound to denude, immediately on the existence of a nearer, in his favour; but he retains the rent falling due, in the mean time, while he was fiar, viz. before the superveneing of the nearer heir^c.

^bJan. 2. 1708. lord Montstewart.

^cFount. Dec. 13. 1709. Mackenzie contra lord Montstewart.

SECTION IV. *The Effect of a Service.*

58. How rights conveyed by a general or special service.

THE effect of a service is, that rights carried by a general service of one as heir of line, of conquest, or heir-male, of tailie, or provision, are fully stated thereby in the heir, in the same manner as they were in the ancestor. But, as to a special service that concerns rights, whereon the deceased was infeft, till infeftment in the heir's person, it is incomplete, and vanishes on the heir's predecease, as I have already observed. But, after infeftment, the heir comes into the ancestor's right, *Hæres ejusdem potestatis jurisque est, cujus fuit defunctus*^d; the heir has the right established in him, in the same manner, and to the same effect as it was in the deceased. The heir's right is termed an Universal Title, in contradistinction to singular titles by gift or sale. At the same time, heirs of tailie and provision have a great resemblance of singular successors, viz. in cases where they, as creditors, may reduce the deeds done to the prejudice of their rights, of which I have treated elsewhere^e, and shall touch upon it hereafter.

^dL. 59. ff. de reg. juris.

^eB. 2. tit. 3. § 133, &c.

59. If one that is both heir of line and provision serve as nearest and lawful heir, he carries not the subjects of the provision.

THE intent of a service, is not only to inquire, and ascertain the Propinquity that intitles one to succession, but likewise the Character under which he claims, to represent the deceased. And therefore, as I formerly remarked, a special service includes a general that is founded on the same character and propinquity, but not otherwise. And, for this reason, one that is both heir of line, and heir-male, of tailie or provision, serving as *Nearest and lawful heir*, carries only the subjects falling to him as heir of line, or heir at law; but not the rights that are provided to him under any of the foresaid characters^f, in

^fJuly 21. 1733. Edgar contra Maxwell.

* Hume (re-
presentation)
July 21.
1738. Edgar.

in respect not only the propinquity must be particularised and proved to the inquest; but likewise the character, under which the party claims the succession, ascertained. And therefore the deeds of settlement, in relation to rights provided to heirs-male, or of provision, granted by one who really was such, but was served only *Nearest and lawful heir*, are void as to the same^a; because such rights remained still in *hereditate jacente* of the fiar, who made such provision or settlement of the estate, the heir's service not having carried the same. And farther, the service being applicable only to him as heir of line, or heir-general, he will be liable universally as such: whereas, otherwise, one that is heir of tailie or provision, and also heir of line, may renounce being heir of line, and serve himself heir of tailie or provision, under that special character; which demonstrates that the one does not include the other, where the proper character is neglected.

^b July 3.
1666. Fleming.

^c Arg. Fount.
June 21.
1680. Sandilands.

THERE is no doubt that heirs of line, heirs of conquest, and heirs-male, are liable universally to the predecessor's debts, upon the passive title of heir served; unless they have served *cum beneficio* (of which I have discoursed in the former title) because they are all, in some measure, heirs at law, and therefore universal successors. But then with respect to the heirs of tailie or provision, that are strangers as to the succession, except in the particular subject wherein they are served, it may be a question if they are further liable than to the extent thereof. It is certain that substitutes, or heirs of provision in bonds, are no farther subjected than to the extent of the sums therein contained^b, the intent of such being only to provide children, or gratify friends therewith, and frequently they are payable "To the fiar, he being on life, and, after his death, to the substitute expressly therein named," in which case no service is requisite, as above observed, the person being certain. And tho' where the sum is payable "To the fiar, and the heirs of his body, whom failing, to the substitutes," the substitutes would need a service as heirs of provision, to evidence that the heirs of the fiar's body had failed, yet still it is only to carry that particular sum, and can subject them no farther. And if it is a moveable bond, tho' the substitute hath right to it by service, yet it will fall to his executors. The same rule holds in a bond secluding executors, that it will fall to the executors of the heir, tho' his title is made up by a service^c; so that for a subject to fall to one as executor, and to be transmitted to him as executory, are quite different things.

60. Heirs of provision in bonds not universally liable.

A SERVICE of one as Heir-general, without respect to any particular, subjects him to the deceased's creditors universally, and is the case of a service of the heir at law, to carry bonds Secluding executors. But the service of one, as Heir in general of provision, as to a particular bond, has not such operation; for the party so served, tho' to make up a title to an heritable bond, is only liable to the extent of that sum, after discussing the other representatives of the granter; because only the heir of line, as heir-general, can carry a bond secluding executors; but such substitute, tho' he serve In general, is only as a legatary. This distinction, between one's serving heir-general, and heir in general of provision, is founded in the nature of the

61. The diversity between a service of one as heir-general, and as heir in general of provision.

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thing; for the first never has respect to any particular subject, and is founded in blood-relation, and therefore has an universal effect; whereas the other only concerns a particular bond, and may belong to one who otherwise is a meer stranger to the party to whom the service is expedited; and which distinction seems to be confirmed by a late precedent ^a.

^a June 5.
1743. Mer-
cer.

62. An heir of entail in a land-estate; how far only liable according to the value of the subjects.

WHERE an estate in lands is provided to heirs of tailie or provision, it may seem that, by a service therein, the heir is universally liable, after discussing the heir of line, to the predecessor's debts; because the ordinary design of such provisions is to make settlements of estates, in order that the granter may be represented thereby; and a title must be made up to the estate by a service as heir, which may be thought to render one thus served in lands an universal representative, if he enters simply, and not upon inventory in terms of the act 1695.

BUT, when the case is duly considered, I humbly conceive, that, an heir of tailie or provision, even in a land-estate, who is a stranger, and hath no title to the succession by right of blood, can be no farther subjected than to the value of the estate. The reason why one, by a service in lands as heir of line, heir of conquest, or heir-male, is universally liable to the debts of the ancestor, is, because such special service includes a general service of the same kind, as above: thus, a special service, as heir of line, heir of conquest, or as heir-male, by the implied general service, will carry all subjects that descend to heirs of such respective characters, beside the particular lands in which they are served; and therefore must subject them universally, the benefit of discussion being always competent to the heir of conquest and heir-male. Now the case is different where one serves as heir of tailie or provision in particular lands, where he does not come under any of the above characters; for it includes no general service, and he cannot, by such service, carry other subjects; and consequently he can be no farther liable than to the value of the lands. As this seems to be founded in the nature of things, so it is a necessary consequence, from the decision of the court of session above referred to ^b, which was in the case of an heritable bond, upon which infestment had followed; and there seems no solid difference between it and the case of lands in property. At the same time, to prevent dispute, the safest course for an heir of tailie or provision in a land estate, is to serve upon inventory, in terms of the act 1695. Which, however, was chiefly intended for the security of the other heirs above mentioned, whose special service includes a general, and would otherwise necessarily subject them universally: whereas, in the nature of the thing, a special service, as heir of tailie or provision, imports an inventory, viz. the particular subject in which they are served, no more being carried thereby, as above.

^b Ibid. Mer-
cer.

63. A dispo-
nee, under a
faculty re-
served, to dis-
pone or con-
tract debt, li-
able only to
the extent of
the subject.

THE case is parallel, where one disposes a land-estate to another, under a faculty to himself to alter or revoke the deed, or to contract debts thereon at pleasure; for, in that case, the disponent is, in effect, an heir of provision, and liable to the debts and deeds of the disponent, to the value of the subject, after discussing the heir of line ^c.

^c Jan. 1723.
creditors of
Risco contra
Blair of Sen-
wick.

SUCH

SUCH heirs of provision, as are creditors likewise, are not liable to make good gratuitous deeds in their prejudice, but may reduce them as fraudulent: this is the case of children as to their provisions in their parent's contract of marriage, who do not represent the predecessor, in respect to gratuitous deeds, inconsistent with their rights^a.

^a July 10.
1677. Carnegie.

AN heir of provision, in a contract of marriage, may reduce a strict entail of the estate, if it appear chiefly intended against him, and contain hard and unreasonable conditions^b; but otherwise, if it is only a rational settlement of the estate, securing it from being squandered, it would seem that the same should be sustained; for a father may even bar such heir intirely from the succession, if he has rendered himself unworthy by his wicked and unnatural behaviour^c. Of this case I have treated more fully elsewhere^d.

^b Jan. 23.
1747. Ker.

^c Hume dec.
50. Douglas.
d B. 2. tit. 3.
§ 134, 153.

HEIRS of entail, in tailies secured by prohibitive and irritant clauses, are no farther liable to the preceeding heir's debts or deeds, than to the extent of the powers allowed him in the tailie, to contract debt, or burthen the estate, as is self evident.

64. What heirs of provision may reduce deeds to their prejudice.

65. How far an heir of provision, in a contract of marriage, may be subjected to a strict entail, or totally excluded.

66. Heirs in a strict tailie; how far liable to debts.

IT is the privilege of creditors of persons deceased, that they are preferable, as to the ancestor's estate, to the creditors of the heir, in case they do complete diligence within three years of the succession's devolving. And as to them, the heir can make no voluntary right thereof for a full year after the predecessor's death^e; and a disposition made within that period is void as to the creditors of the deceased, even tho' they had done no diligence within the three years^f.

^e P. 1661.
c. 24. Dec.
19. 1678.
Paterfon.
^f Nov. 26.
1647. Taylor.

THO' heirs are liable to the predecessor's debts, in manner foresaid, yet the benefit of discussion is competent to some heirs, That others must be discusst before they can be reached, as above hinted. If the heir, who otherwise might be subjected in the first place, renounce, he is sufficiently discusst, unless an *hereditas jacens*, i. e. an estate or subject falling to him, is particularised, which, in that case, must be adjudged for payment of the debt^g; and thereafter the creditor may insist against the other heirs; for tho' sometimes discussion is to affect the whole subject of succession, falling to the heir primarily liable, and to apply it toward payment of the debt, in case there is no impediment; yet for most part an adjudication of it will make way for action against the other heirs, who will be decreed to make payment upon the creditor's assigning the diligence^h, it not being reasonable that a creditor should be involved in difficulties in recovering his debt, to which all the heirs are liable. If the heir, who was intitled to the benefit of discussion, renounce being heir, he cannot plead such privilege, in order to stop an adjudication of the *hereditas jacens*; for he has no interest, so far as concerns the creditor in whose favour he renouncedⁱ.

^g Fount. Jan.
11. 1698.
Colquhoun.
Bruce decif.
40.

^h Dirlet. decif.
69. June 22.
1678. Crawford.
Jan. 29.
1671. lord
Torphichen.

ⁱ Nov. 20.
1630. Prov.
of Stirling.

67. How far creditors of the deceased preferable to those of the heir.

68. The benefit of discussion among heirs of different kinds, and their relief against one another.

69. The order of discussion of heirs.

THE order whereby heirs are subject to creditors is, that the heir of line is liable in the first place; next the heir of conquest, both which are heirs at law; thereafter the heir-male, who, in respect to the heir of line and of conquest, may be regarded as an heir of entail; because it is not by act of the law, but by the destination of the deceased

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deceased or his ancestors, that he succeeds ; and, after him, an extraneous heir of tailie or provision, by simple destination, may be insisted against ; and, last of all, the children, as heirs of provision in a contract of marriage, who are in some measure creditors ; and even extraneous heirs of provision in bonds are only liable, after discussing both heirs at law and executors of the deceased ^a.

^a Fount. Feb.
10. 1700.
Wells.

70. What if the deceased has bound himself and his heirs to pay, without the benefit of discussion.

IF the heir, who had the benefit of discussion, neglect it ; or if the ancestor had obliged himself and his heirs, *Without the benefit of discussion*, the heir who pays hath relief against the other heirs, who were liable in the first place ; for tho', in behalf of that creditor, the debtor had renounced the benefit of discussion of his heirs, yet he is not presumed to intend thereby to prejudice the relief competent against the heirs, who, by the law, are liable in the first place. But if the deceased has singly bound himself and his heirs-male, or other special heirs, they have no relief ; nor have they relief in respect to obligations, directly relative to the subject of their succession, and affecting the same ; because the intention of the debtor appears plain, that such heirs should be liable without relief.

SECTION V. *Heirs-portioners.*

71. Heirs-portioners liable to the debts proportionably.

HEIRS-portioners are universally liable to the debts proportionably to their share of the estate, from the nature of their succession ^b. This was the case by the civil law ; because the debts were, *ipso jure*, divided among co-heirs, as well as the succession ; so that any one of them was no more concerned with the other's shares, than if it were the debt of a stranger ^c. But, from the nature of the thing, as well as by express decision of the civil law, they are liable severally for the whole of indivisible obligations ; and each may sue for performance of such, when due to the ancestor, the pursuer finding security to the defender at the hands of the rest ^d.

^b July 30.
1672. Fowles.

^c L. 3. l. 4.
pr. ff. l. 6.
c. famil. excif.

^d L. 25. § 9,
10. ff. fam.
excif. l. 78.
§ 2. ff. de contrah. vend.

72. Heirs-portioners only liable, according to their proportions in the estate succeeded to, whether equal or unequal.

HEIRS-portioners are only liable to the debts, proportionably to their shares in the succession ; but since the whole heirs-portioners represent the deceased jointly as one heir, they ought all to be called in an action for payment of the debts of the ancestor ^e. And if he had disposed the whole estate to one of them, or the rest have resigned their shares in favour of one, that one who has all the benefit will be decreed for the whole debt ^f. And if they succeed to unequal shares of the debtor's estate, whether mediately or immediately, they will be liable by the same proportions to the debt. Thus, if one die, leaving a son and a daughter of one marriage, and a daughter of another, and the son makes up a title to part of the estate, and dies without issue, the two daughters will succeed equally as heirs-portioners to their father, in the remainder of the estate ; but the one that was sister-german to the son will succeed alone to him in that part of the estate established in his person. But both daughters will be liable to the debts of the father, not equally, but according to their respective shares of the estate left by him at his death ^g.

^e Jan. 18.
1672. master of Salton.
Jan. 24.
1672. Lufs.
^f Feb. 7.
1632. Hume.
Feb. 15.
1634. Orr.
Jan. 24.
1642. Scot.

^g June 10.
1673. White.

73. If the ancestor has conveyed

THE case may seem to alter, if the father himself disposes part of his estate to one of the heirs-portioners, for that then they would be equally

* Decem. 20.
1673. Jack.
Fount. Feb.
19. 1695.
Sinclair.

equally liable to his debts, without regard to the part of the estate disposed to one of them; because, regularly, there is no collation as to lands^a, that only taking place in moveable rights. But the father's intention may appear, from the nature or conception of the deed, to be, that the right shall be ascribed in satisfaction of her share in the succession, in whole or in part; and the succession and burthens affecting it will be regulated accordingly.

part of the estate to one of the heirs-portioners, is she bound to collate the same.

* July 30.
1672. Foulis.

THERE is no question, but one of more heirs-portioners paying the whole debt, to which she is only liable proportionably, has relief against the rest for their proportionable shares. But it is doubted, whether the creditor, who has only immediate action against heirs-portioners for their proportions, can return to any one of them for the proportions of the rest that are found insolvent. It has been adjudged, that the creditor must discuss the rest of the heirs-portioners for their proportions of the debt, before he can affect any one for the whole^b. And the court took it to consideration, whether any of them, after such discussion, shall be liable for the proportions of the insolvent, to the value of her own share of the estate succeeded to. But there has been no judgment, that I know, finding in such terms, and much less that one of them can be farther subjected, for the deficiency of the insolvent, than to the value of her own share in the succession. And, with great submission, it may seem, that as the succession is divided by the law, so the debts are, and can only affect each heir-portioner for her own share; unless, by the deed of the ancestor, she is farther subjected, as having perhaps got right to the greatest part of the estate. In which case, to be sure, the rest will renounce, and their shares of the remaining estate shall be adjudged by the creditors; and, if the same does not satisfy their proportions of the debt, the disponent will be liable, either upon the passive title of *Præceptio hæreditatis*, or on the act 1621, if the right was gratuitous, and the party thereby became insolvent. And, in other cases, 'tis the creditors own fault, if they do not affect the shares of all the heirs-portioners in due time, before they become insolvent.

74. Is one of more heirs-portioners liable for the deficiency of the rest.

* July 30.
1678. lady
Lufs.

LANDS that belonged only to the predecessor in superiority, devolve on heirs-portioners likewise by equal shares, and not to the eldest alone; because it is as much an heritable right, as if the full property had belonged to him, and must be transmitted in the same manner, whether by singular or universal titles. And indeed, it is a right of property in all questions, except where the vassal's right competes; and the right is constituted by infeftment in the lands, and not in the superiority of them only. But, for the conveniency of the vassal, he may take infeftment of the eldest heir-portioner by the prerogative of her birth^c; unless they all agree to subscribe one precept. And, since it can hardly be doubted, that where they concur in receiving the vassal, they must be all equal sharers in the relief, and bygone duties and casualties of the superiority, the consequence must be, that they are equally interested in them, even when the eldest, upon the vassal's application, enters him, that being only indulged for the vassal's ease, and not to give any advantage to the eldest over the rest. But this can only hold, where the lands remain undivided; and each of them hath a right, *pro indiviso*, over

75. Superiorities devolve to all the heirs-portioners, as other lands; but, in the division, if there is only one, it must be adjudged to the eldest; and, if more, to the rest, according to their seniority.

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the whole, but not after ; for, when the estate comes to be divided, if there is only one superiority, it will be adjudged to the eldest heir-portioner, and the rest must denude of their shares of it in her favour, and she is liable to them in a recompence proportionably. And, if there be more superiorities, the eldest heir-portioner has the first election, and the rest according to their seniority, and the recompence is proportioned, so as an equality may be made among them^a, as I observed in another place^b.

^a June 1743.
heirs-portioners of Carnock.
^b B. 2. tit. 4. § 6, &c.

76. An equality imported in the brieve of division.

THE case just referred to was of feu-superiorities; but, I conceive, the same rule will hold in others, for the division of an estate, among co-heirs, proceeds upon a brieve in the king's name, directed to the sheriff, which enjoins him to make a just division of the lands. Thus, as heirs-portioners are called by the law to equal shares of the inheritance, and are served therein accordingly, so the execution, whereby the right is made effectual, imports an equality. And tho' indivisible rights cannot fall under a division, properly so called ; yet, by this action, there must not only be adjudication of parts of the inheritance to each of them, but likewise personal obligations, from the one in favour of the other, may be imposed upon them, in order to make an equality. And consequently, where an indivisible patrimonial interest, as a superiority, is deemed to be in favour of the vassal, the eldest heir-female, to whom it shall be adjudged, must be subjected in a contribution to the rest, according to the ordinary value.

77. The parallel between the *actio familiaris erciscundæ*; and the action of division among co-heirs.

THUS, in relation to the *actio familiaris erciscundæ*, after the example of which our action among heirs-portioners was introduced, 'tis said, *Familiaris erciscundæ judicium ex duobus constat, i. e. rebus atque prestationibus*^c. And divers instances are mentioned in that title, of adjudging total rights to one of the heirs, and subjecting him in a recompence to the rest ; and even where the rights were divided by the law, it was the part of the judge, for the conveniency of the parties, to allot them solely to one. Thus, as to *nomina*, or debts due to, or by the deceased, which, by the law, were proportioned among co-heirs, it was incumbent on the judge to assign them over to one, and subject him proportionably to the rest ; or to burthen one of them with the payment of a whole bond, and ordain him to be relieved by the other heirs-portioners proportionably: in which case, the party, to whom the debt was allotted, sued for it in his own name, as to his own proper share ; and in name of the rest, as to theirs, *procuratorio nomine*, as factor or attorney for them. And, in the same character, he who was burthened with a whole debt, defended in a suit for the same; and the reason assigned is, *Quia sæpe et solutio et exactio partium, non minima incommoda habet*^d; because receipt by the several heirs of parcels of the same debt, or payment of it in that manner, is frequently most inconvenient.

^c L. 22. § 4. ff. fam. ercif.

^d L. 4. ff. eod. tit.

78. Where indivisible patrimonial interests go to the eldest, she is liable in contribution to the rest.

AFTER this example lands, of which the superiority belonged only to the ancestor, descend to all the heirs-portioners, and they are intitled to have the same divided among them ; but, on account of the inconveniency the vassal would sustain by such division, it is to be allotted to the eldest, where there is only one. But, there is no reason why she ought to enjoy that benefit, without satisfying the rest

rest for their proportions; and it would seem, that nothing less than the legislative authority can take from them their shares, without such recompence. And, where the foresaid inconveniency does not take place, as in the case of more superiorities, one ought to be assigned to each, and recompence given, so far as they are of unequal value; in the same manner as in the foresaid case of allotting a debt totally to one of the co-heirs, by the direction of the civil law. And which, with submission, ought to obtain not only in respect to feu-superiorities, yielding a constant rent, but likewise in all other superiorities, the reason being the same in those of every kind. So that the inference which may seem to follow from that decision, That blench superiorities must be allotted to heirs-portioners, according to their seniority, without any recompence to the rest, as I set forth in the place before quoted^a, merits to be farther considered; for, tho' a feu-superiority was there valued, according to the feu-duty, without regard to the casualties; yet, it would seem just, that the superiority itself, to which the feu-duty is incident, should receive a valuation according to its real worth. And this was strenuously contended in a very late case, upon a hearing in presence, in relation to blench-superiorities devolving to heirs-portioners^b, but received no judgment, the parties having desisted, or agreed among themselves.

^a B. 2. tit. 4.
§ 6.

^b July 1750.
heirs-portioners of
Gadgirth.

If an irritancy of the fee was incurred in the deceased superior's life, it may be doubted, whether the action is competent to all the heirs-portioners, or to the eldest alone, for declaring it. It would seem, that it can only be sued by them all jointly, since they represent the ancestor as one heir; and, if they prevail, the fee opens and belongs to them, as any other part of the ancestor's estate; for the declarator does not constitute, but only declares the right.

79. Declara-
tor of irritan-
cy of the
feude belongs
to all the
heirs-portioners.

^c Mackenzie
inst. lib. 3.
tit. 8.

JURISDICTION likewise, as an indivisible right, is said by some to fall to the eldest heir-portioner^c. But, since 'tis annexed to the lands, which fall equally to them all, I cannot apprehend how it can devolve to the eldest; for the parts of the estate that belong to the rest must be holden independent of her. Jurisdiction must always follow the subject to which it is inherent, and therefore each must have the like jurisdiction over her own share, as the ancestor had over the whole estate.

80. How far
jurisdictions
belong solely
to the eldest
heir-portioner.

^d Dirl. tit.
(heirs-portioners) et
ibid. Stewart.
art.

If the lands devolving to heirs-portioners were erected into a Barony, the rights and privileges of the barony cannot be lost; and therefore, it is admitted by all, that the same would belong to the eldest, in respect to her own share, but without any jurisdiction over the shares of the rest, who hold theirs of the crown. How far the rest would have the like privileges, as to their shares of the lands in the barony, is left as a doubt by lord Dirlton, and thus resolved by Sir James Stewart, viz. That all of them will have a right to a power of bailiary, but that the dignity of a baron should remain with the eldest alone, to whom, according to him, all superiorities belonging to the barony fall^d. But, as to personal dignity, there is no doubt all the heirs-portioners have the dignity of a baron's daughters or sisters, &c. And I incline to think, that all of them would be equally intitled to the privilege of baronies, as to their respective shares; for, tho'

81. If the
lands devolv-
ing to heirs-
portioners
are a barony,
have all of
them a right
of barony as
to their own
shares.

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tho' a baron cannot, by his deeds, multiply the barony into more, yet here it is by the operation of the law, which must have the same effect as special grants from the crown to each heir-portioner, in relation to her share. And it is impossible the eldest could grant a power of bailiary to the rest, as to their shares, which are independent of her; so that they must either have the privilege in their own right, or not at all. They, and their heirs, must be severally infest in their own lands, upon the ground of the same, and not at the mansion-house which falls to the eldest, tho' that was perhaps the place mentioned in the charter of erection, for taking seisin for the whole lands.

82. Patronages of churches belong to all the heirs-portioners.

THE patronage of churches, tho' an indivisible right, falls equally to all the heirs-portioners, who only represent the predecessor jointly as one heir; and, in the exercise of it, they may either all concur in the same presentation, or present by turns, as in the case of other joint-patrons. It may be pretended, that, from the example of superiorities, the younger heirs-portioners, after making up titles, must denude of their interests in favour of the eldest, it being an indivisible right; and that, without any recompence from her, a right of patronage having originally no patrimonial benefit attending it. But the difference is plain, for a vassal can neither be obliged to hold of all the heirs-portioners jointly, or he and his heirs to take infestment of them by turns; whereas a right of patronage may be exercised by them, either jointly, or by turns; and therefore, I conceive it will remain with them all equally, as I have observed elsewhere^a. And this more especially must hold at present, since the patronage carries a patrimonial right to the free tithes of the parish.

^a B. 2. tit. 8. § 26.

83. Titles of honour and heritable offices go to the eldest heir-portioner.

ALL heritable titles of nobility go to the eldest heir-portioner; and, as to heritable offices, it would seem, that the eldest heir-portioner is intitled to have the same adjudged to her from the rest, and she to make proportionable contribution to them, for the value of all the constant fees or salaries annexed to such offices; but otherwise, without making any recompence for the perquisites that may be incident to them; these being frequently due, on account of some service to be performed by the party vested with the office, or his deputy. No service is necessary for the conveyance of a title of honour or dignity to the eldest heir-female, more than where it descends to an heir-male.

84. The principal messuage goes to the eldest heir-portioner; is she liable in a recompence to the rest.

THE eldest heir-portioner, by the prerogative of her birth, carries the principal messuage or seat of the family, as a *præcipuum*, with office-houses, gardens and orchards thereto belonging: but this extends not to houses in royal borows, or farm-houses; and the lords of session have found that she is not obliged to make contribution for the value to the rest^b. But as to the recompence, it may merit farther consideration; for, conform to our antient law, whence this prerogative is derived, the chief messuage was reserved to the eldest daughter, for which she was to recompence her sisters^c: and this is likewise the opinion of our eminent feudal lawier, and was formerly so adjudged^d. And the decision, in the case above referred to, proceeded on an erroneous supposition, *viz.* that it had been settled in that manner, in the case of the heirs-portioners of Carnock; where-

as

^b June 24. 1708. Cowies.

^c Reg. maj. lib. 2. c. 27.

^d 4. c. 28. § 3.

^e Craig, lib. 2.

dieg. 14. § 7.

Fount. Nov.

12. 1696.

Hawthorn.

^a June 1743.
heirs-portioners of Carnock.

as that case did not come in question for many years thereafter, and not till of late ^a; and the point was much controverted, and was at last compounded without a decision. And, in consequence of the other points decided between those parties, it would seem to follow, that a recompence ought to be made to the younger heirs-portioners for the value of the messuage and gardens, these importing a constant patrimonial interest as much as a feu-duty.

SECTION V. *Questions relating to Services, and Reduction of the same.*

It sometimes occurs that special sums are contracted to the heirs of different marriages, who happen to be all heirs-portioners; or bonds of provision may be granted to heirs-female of the same marriage, by unequal portions, and the question may arise, how far each has access against the rest for payment of their provisions? For answer, Where all of them serve heirs-portioners, then their provisions become extinct *confusione*, as to their own proportionable shares of the succession, and they have access against the rest for the remaining proportions, as creditors therein. For example, in the case of three heirs-portioners, of whom the eldest has 9000 merks, the second six, and the youngest three, the first has action against each of the other for 3000 merks, the second for two, and the youngest for 1000 merks, the proportion corresponding to each of their own shares in the succession being sunk; so that in balancing accounts, the eldest gets clear from the second 1000 merks, and from the third 2000 merks, and the second has 1000 merks clear from the third. And, on the whole, the second daughter's portion of 6000 merks is sunk, and she is liable in nothing to any of her sisters; for the 1000 merks which she had from the youngest goes to the eldest; and thus the eldest, for her 9000 merks, draws 3000 merks from her youngest sister, to whom, in the partition, a third share of the estate must be allotted with that burthen; and consequently the result of these provisions would only be a provision of 3000 merks to the eldest sister beyond the rest, as a *præcipuum*. If any of them renounce or abstain from the succession or inheritance, action is competent, at her instance, against the rest for their proportions, and she may adjudge, in the name of a trustee, upon a decree *cognitionis causa*, against herself for her own proportion, and against the rest as to their proportions, on decrees of constitution, as other creditors. If the succession is wholly destinated to one of them, action may be sued, by the rest that renounce, against her, for their provisions ^b.

^b Feb. 15.
1634. Orr.

85. If provisions for different sums are made to heirs-portioners, how is the case expedited.

WHERE a man, by inadvertency, provides the same estate to the heirs of a second marriage, that was provided formerly to those of the first; in such case, I conceive, the heir of the first marriage is intitled to reduce the provision in the second contract as fraudulent. At the same time, the father might have made suitable provisions to the wife and children of the second marriage, to which the heir of the first would have been liable in default of other funds than the estate provided to him; and consequently the court may, in my apprehension, modify suitable provisions to them out of the estate in such case, and reduce the right only upon payment of the sums modified

86. What if one, in his several contracts of marriage, provides the same estate to the heirs of the respective marriages.

dified for their provisions, or the pursuer may be burthened in the decree therewith.

87. How far provisions to children nascituri, subject them to creditors.

IT has been already observed, that an heir of provision, or substitute in sums of money, is only liable to the granter's creditors, to the value of the subject, and that he frequently requires no service, being creditor in the provision. I shall only add, that, as his acknowledging the right is in place of a service, there is sometimes a difference in such provisions, even where no service is necessary: thus, if the sums are contracted, payable only at the father's death, the children are intitled to the same without any service, and yet they are liable to both prior and posterior creditors to the extent thereof in their due order, in the same manner as if they were served; or, which is the same thing, the creditors are preferable to such provisions. But if they are payable to the children at their marriage or majority, or any other term which may happen in the father's life, they are only liable to challenge, if he was then insolvent, and the same within the act 1621, as in the case of bonds of provision. I had occasion to take notice of this more fully in another place ^a.

^a B. I. tit. 5. sect. 1. § 15, &c.

88. Does an heritable bond, payable to one during his life, and after his death to another, go to the substitute without a service.

AN heritable bond being taken payable "to one during his life, "and, after his death, to another," it directly belongs to that other as substitute, without any service, if the institute or fiar die before infestment, in the same manner as if it were simply a moveable sum. But if infestment proceeded in the person of the institute, the substitute must be infest as heir to him; for the feudal right cannot otherwise be taken out of the deceased's person, nor can the substitute renounce or convey the infestment, unless he is vested with it ^b.

^b Arg. Jan. 14. 1663. Begg.

89. A service may be retoured after the party's death; but as a special service, it can only have the effect to support the general service included therein.

A SERVICE, before it is retoured, subjects the party to the debts of the ancestor, by the passive title of heir served; but is not an active title for recovering the subjects of the succession till retoured ^c. However, it may be retoured at any time, even after the party's death, as above. This holds in general services, which make a complete title to heritable personal rights; but special services, as is already observed, fall and become ineffectual, unless infestment follow in the persons of the heirs served, which cannot be till they are retoured. And therefore the retouring one's special service after his death is useless, except as to the effect of a general service included therein.

^c Spotifw. (brieve) MacCulloch. Jan. 5. 1670. Innes.

90. A special service sometimes null or reducible; if one is served during his minority, he will be restored; but not if he was major, tho' great debts emerge.

A SPECIAL service is null, if carried on before an incompetent judge, or any other than the judge ordinary, within whose territory the lands or subject, served, do lie; unless before the macers by a special commission, or remit from the lords of session to them, upon advocacy from the judge ordinary, as above. But otherwise a service, where quarrelable, must be removed by reduction: thus, one may reduce a service, expedited for him in his minority, at any time within the *quadriennium*, or before his age of 25 years complete; or if he had curators, and it was done without their consent, at any time before his homologation of it, after his majority. When one reduces a service on minority, the lesion is, that he involved himself in a succession which he was not bound to do, and which may, perhaps, be *damnosa hereditas* ^d; but he is under no necessity to particularise any

^d L. 57. § 1. ff. de acqu. vel omit. hæred.

ny damage; for it is in the option of every person who is intitled to be heir to enter to the succession, or to abstain, as he thinks proper; and therefore the minor is well founded to be restored against the representation, and to be at liberty to determine himself thereafter, as he shall be advised. But otherwise, one arrived at the age of majority, serving heir to his predecessor, cannot regularly be reponed, even tho' unforeseen debt should thereafter appear, whereby he may perhaps be ruined. Hence it is justly said, that *Semel hæres semper hæres*, i. e. one that serves heir is always heir thereafter; and considering that the heir has not only a year to deliberate upon the circumstances of the succession, but may likewise, by the present law, enter upon inventory, he merits no relief if he involve himself unadvisedly in an unprofitable succession. However one of our great lawiers of old thought there was remedy in such case, by way of reduction and declarator, tho' not by exception^a.

^a Craig lib.
2. dieg. 13.
§ 14.

At the same time, tho' the heir of line serving in general cannot be reponed against the service, yet I conceive that, if one serve himself heir in special to an estate, which afterwards, upon an unforeseen emergency, is evicted from him, he ought to be relieved. For example, if one believing, upon probable grounds, that the estate descended to him as heir of line, serve himself therein as such, and which afterwards is found to have been provided to heirs-male, or, on the contrary, and thereon his service is reduced: and in such case the general service implied in the special cannot subject the party; for, being consequential only to the special, it falls therewith: and it was only on supposition that the estate devolved to him that he did serve, and, when that fails, the service can have no effect^b; and, in this view, the *quasi* contract of the heir with the creditors, by the service, must be considered as *ob causam datam non secutam*, i. e. on a supposition that does not hold; for he is entirely divested of the character, and the service was erroneous. The rule, *Actus agentium non operantur ultra eorum intentionem*, that the acts of parties cannot operate beyond their intention, may be here applied; for the heir intended only to serve to a particular estate, from enjoyment whereof he is barred by a supervening discovery.

^b Harcus
(heirs)
March 1683.
Farmer.

91. If the estate is evicted from the party served heir therein, as not being heir, he will be restored.

A THIRD party may reduce services, when erroneously expedited to his prejudice: this reduction was of old proceeded in by an assize of error, or grand inquest of 25 landed gentlemen, upon a precept out of the chancery. By this it was intended not only to set the service aside, but likewise to have the persons of inquest punished, conform to the prescription of our old law, as *temere jurantes super assisas*, or guilty of forswearing themselves, and therefore it behoved to be a wilful error, contrary to the plain evidence laid before them. Such was the case of old likewise as to all inquests in criminal causes, who, by partial favour, acquitted the defender; the punishment was escheat of moveables, outlawry, and perpetual infamy^c. This solemn manner of reduction was only competent within three years after the service, where the party was major and within the kingdom^d, or otherwise within three years after his majority or return; but now these assizes of error are declared a grievance, by the claim of right^e, and have therefore never been used since the revolution. This triennial prescription was

^c Reg. maj.
lib. 1. cap.
14. P. 1473.
^d c. 63. Mac-
kenzie on
that statute.
^e P. 1494.
c. 57.
^f Conven. of
estates, 1689.
c. 18.

92. Reduc-
tion of servi-
ces proceed-
ed, of old,
by a grand
inquest; and,
for punish-
ment of the
assizers, it
was limited
to three
years.

only

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only a bar against suing the persons of inquest for error in their verdict, in order to punishment; but not against the righteous heir's setting aside the service of another to his prejudice, as the sense of the old statute is declared, by the posterior one, limiting the heir's action, to reduce an erroneous service to 20, and the accusation of the persons of inquest, for willful error, to three years^a. This statute, tho' in appearance declaratory, extends only to services to be expedited thereafter; so that it must be intended rather a statutory than a declaratory law.

^a P. 1617.
c. 57.

93. Procedure in the reduction of a service.

BUT now services and retours generally are removed by an ordinary action of reduction, before the court of session, at the suit of the party leased^b. In this action the judge and clerk to the service, as well as the party served, regularly ought to be called^c; that the service and grounds whereon the inquest proceeded may be produced before the lords, and the service reduced. But tho' there are no documents extant for instructing the propinquity, that will not be sufficient to reduce the service; because such are sometimes not carefully preserved, and the inquest might have proceeded on their proper knowledge; and therefore the lords, in such case, examine them thereon. A service may likewise be summarily set aside by exception, proved by the party's oath that he is a bastard^d, or otherwise not intitled to the succession.

^b Had. July 14. 1610. la. Wedderburn.
^c Feb. 17. 1624. Elphinstoun. July 7. 1663. Mow.

^d Spotisw. (brieves) Murray.

94. The heir may serve at any time, unless he is excluded by prescription, upon a retour of another as heir.

IT is a rule of law, that *Jura sanguinis nullo jure civili dirimi possunt*^e; The rights of blood cannot be abolished by a civil constitution; and the maxim that *Juri sanguinis nunquam præscribitur, i. e.* No prescription lies against the right of blood, is built upon it. Hence one that proves his propinquity to his ancestor, tho' in the remotest degree, may inherit to him: hence likewise, after the succession opens to an heir, of whatever kind, he may enter without limitation of time; for his right being founded, he may use it at any time, and his entry is *res meræ facultatis*, which prescribes not. But if another usurps his right, by being served and retoured heir, this being a solemn judgment, tho' erroneous, founded on the verdict of 15 good men of inquest, upon their great oath, it becomes irreversible, by special statute, after 20 years^f.

^e L. 8. ff. de reg. juris.

^f P. 1617.
c. 13.

95. How the heir's right saved from prescription, where another is served.

WHEREFORE an erroneous retour must be brought under challenge within 20 years, by reduction, otherwise the action prescribes; but the prescription is excluded, not only if the true heir has got his title ascertained by serving heir, but likewise if the estate be adjudged from him on his own bond, as lawfully charged to enter heir therein, within that time, which is equivalent to a service^g. Further, an adjudication against the lawful heir, upon a decree *cognitionis causa*, within the 20 years, will bar the prescription; for the heir, by his renunciation, acts upon his title to succeed, and thereby suffers the right of the estate to be stated in the adjudger's person, in the same manner as if he had entered thereto, and conveyed it to him. Adjudication likewise of the estate upon the heir's bond, or the ancestor's, will prevent the prescription; for the creditor thus takes up the heir's right, and may prosecute his diligence in due course. Singular successors, who had acquired, before the date of the act, lands and heritages,

^g Gilm. decis. 169. Nov. 28. 1665. Younger.

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heritages, *bona fide*, from persons already retoured thereto, are secured by the act: wherefore, the rule is, That singular successors thereafter are liable to reduction of their author's erroneous retours, during the vicennial prescription, contrary to the opinion of our learned observator upon this act^a. The liferenter's possession, by a deed from the deceased, will not be profitable to either of the contending parties, as to the positive prescription; but will accrue to him who prevails, so as to exclude the pretensions of third parties^b.

^a Sir George Mackenzie, observ. on P. 1617. c. 13.
^b D. decis. Younger.

ONE who is unquestionably preferable in the succession may serve, notwithstanding another is wrongfully served; as where the daughter or sister is served, while the son or brother, or their lawful issue, are alive, such service is void, without necessity of reduction^c; unless confirmed by prescription of 20 years; for such prescription, after a service, will bar the true heir's right.

^c Feb. 16. 1627. lord Colvil. Jan. 11. 1673. Lamb.

THIS prescription takes place, tho' the party retoured and infest has not been in possession at all; for the negative prescription cuts off the action, to reduce the retour, after 20 years silence of the party interested^d. It concerns likewise general services and retours, to secure to the party retoured such rights as are conveyed thereby. And, since the act mentions Retours and services, the prescription cannot commence till the service is retoured; and indeed, till then, it is no complete deed, nor can be deemed as on record. The term of 20 years was, by our legislature, thought sufficient for the true heir to claim his right, and long enough for the titles of persons retoured heirs to lie at uncertainty; since the long prescription of 40 years would be inconvenient to purchasers from them, and unsecure our land-rights; which, however, was the case as to retours expedited before this statute^e.

^d D. decis. Younger.

^e Ibid.

WHEN a disponent to a subject, clogged with a substitution, accepts not, the right must fall, and not belong to the substitute, who could only have access by serving heir to the disponent, which the substitute cannot possibly do, while the disponent or his issue are on life. And, tho' he happen to die without issue, after he has renounced, the substitute cannot be served to him in the right which the disponent renounced, whereby it became void; so that of necessity the heir who would have succeeded, if no such right had existed, must have the only title to the estate, by serving heir therein to the granter^f.

^f Bruce MS. June 15. 1716. Hamilton.

SECTION VI. Other Methods of representing an Ancestor, besides a Service as Heir.

THO' a service is the direct way of making up a title to the succession of an ancestor, yet this may be done by other methods. Thus, one may infest himself upon the superior's precept of seisin, termed *Clare constat*, from these remarkable words in it. This imports, that he knows the person, to whom it is granted, to be heir to his predecessor, from authentic documents. Infestment upon such precepts makes an active title, with respect to the subject, against the superior, and others claiming under him; but, as to third parties, it is of no value, unless supported by the deceased's titles, or prescription. It is,

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however,

96. Sometimes an erroneous service falls without any reduction, by the service of the true heir.

97. The prescription operates, tho' the party served did not possess; good in favour of a general service; it commences from the date of the retour.

98. If the disponent renounce the right, not the substitute, but the heir at law takes the subject.

99. Of infestments on precepts of *clare constat*, or other voluntary precepts granted by a subject-superior.

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however, an universal passive title, in the same manner, as if the person had been heir served. If it should happen, that the superior grants such precept, without the heir's knowledge, whereon he is infest, he may reduce it, on a proof by the superior's and attorney's oaths, that such was the case, unless he has homologated the same.

SOMETIMES the superior grants a voluntary precept to infest the heir, not upon his own knowledge of his right to the succession, on seeing his documents, but in respect of a retour of him as lawful heir. And, if it is a special service, then, to be sure, 'tis in the same case as if the superior had granted the precept of seisin, after being charged for that purpose pursuant to such retour. But, if it is only a general service that the superior relies upon, for ascertaining the propinquity, the precept and seisin upon it has no higher effect, than if it was an infestment upon a precept of *Clare constat*.

100. Of the entry of heirs in burgage-tenements.

ONE may likewise enter in lands or houses, holding burgage by Hasp and Staple, *more burgi*, according to the custom of burgh: the solemnity whereof is instructed by the instrument of seisin given by the baillie and town-clerk^a. This, in the same manner, is an universal passive title, but only an active title as to the particular subject wherein the seisin is taken; and not completely so neither, unless supported by the documents of right in the deceased's person. Ordinarily this entry proceeds on Cognition, before the baillies, of the heir's propinquity; but, if that is known to the baillies, nothing hinders them to enter him by a precept of *clare constat*^b. But magistrates are not bound to grant infestment by hasp and staple; nor other superiors, precepts of *clare constat* for infesting of heirs, unless upon special retours^c. Which likewise is requisite by the late statute, in order to a summary charge against superiors for that purpose^d.

^a July 30. 1629. Wilson. March 19. 1629. Yeoman.

^b Gilm. decis. 51.

^c Gosf. July 15. 1668. magistrates of Stirling. ^d 20 Geo. II.

101. The heir may succeed by adjudication upon his own bond.

AN heir also, in place of entering to the succession by service, may grant bond to the value of the estate, in the name of a trustee, as above hinted, and cause adjudication of the estate to be led against himself, as specially charged to enter heir therein. This adjudication coming into his person, makes up an active title to the estate, in the same manner as if he were served; and, if he possess by virtue thereof, it becomes an universal passive title; but, before possession is attained, it does not subject him^e.

^e Act of sed. Feb. 28. 1662. P. 1695. c. 24.

102. Or by disposing the estate to a trustee, and adjudging on a special charge.

THE apparent heir may likewise directly dispoise the predecessor's estate to a trustee; and an adjudication in implement against himself, on a special charge, will complete the title. But, in this case, the granting the disposition would be an immixtion, and owning the succession, and subject the heir *passive* to the predecessor's debts, even without having assumed possession of the estate; and that whether the right granted by him, and diligence led pursuant thereto, were to his own or the receiver's behoof, the disposing the estate being a most direct Behaviour as heir, since he conveys the estate as his own.

103. What if the heir possess the estate

IT is provided by statute, for the security of creditors, That if the heir possess the estate, that belonged to his predecessor, upon other titles

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titles than as purchaser thereof, at a public roup before the court of session, it shall be an universal passive title, whereof I shall have occasion to treat in the next title^a.

otherwise than as purchaser at a roup.

^a P. 1695.
c. 24.

WHEN one that has right to succeed possesses the predecessor's estate, persons are induced to lend him money, or otherwise to contract with him, in the belief that he hath made up titles to the subject; therefore, in case he so possesses, for the space of three years after the predecessor's death, tho' he die in apparency, the next heir who enters by service, or adjudication upon his own bond, to the predecessor that died last seised of the estate, and passes by the apparent heir who was never entered, nor had otherwise completed a right in his person, is declared liable to the debts and deeds of the interjected apparent heir, to the value of the estate^b.

104. The triennial possession of an apparent heir, dying in his apparency, subjects the next heir who enters to the last infest, to the value of the estate.

^b D. P. 1695.
c. 24.

IT should seem not to alter the case, whether the heir formally enter by service, or otherwise make up titles to the estate, in manner above described, or even possess it without completing any titles; for That inferring a behaviour, and subjecting him universally to the debts of the ancestor last infest, it may be pleaded, that the same states the appearand heir in the same circumstances, in respect to creditors of the interjected apparent heir deceased, as if he was lawfully entered, in order to his being liable to them in the value of the estate. But the act refers specially to the next heir's passing by the deceased apparent heir, three years in possession, *By service to the remoter predecessor, or by adjudication upon his own bond succeeding to him*: and the court of session, considering this as a correctory law, would not extend it beyond the cases precisely therein provided for. And therefore found, that if the next heir did not succeed to the remoter predecessor, one of these two ways mentioned in the statute, but possessed the estate, without making up any titles to it, the creditors of the deceased interjected apparent heir, tho' he had been much more than three years in possession, had no action against him^c.

105. If the next heir does not enter, it was formerly thought, that the creditors of the deceased apparent heir could not reach him.

^c Feb. 20.
1736. lady
Rater. June
1742. lord
Banff.

By this means the statute seemed to want the interposition of the legislature, to extend it to every case where the next apparent heir possesses the estate, whether he makes up titles to it or not, that one who fairly enters to the estate, by completing titles to the same, may not be in a worse condition, than he who possesses without making up titles thereto. But, in such case, of the next heir's lying out unentered, the equity of the creditors claim, and the unfavourableness of the heir's intention to disappoint their payment, did move the barons of exchequer, and frequently subject-superiors, to grant them gifts of the casualty of non-entry; that, on obtaining declarator thereof, they might turn the heir out of possession of the estate, and thereby force him to enter, or lose all the benefit of his not entering. This expedient did, for most part, justly frustrate those schemes for eluding the statute. However, a case happened, where the next apparent heir possessed without making up titles to the estate; and some of the creditors of the deceased apparent heir, (who had been three years in possession) obtained decrees of constitution against him in his minority, subjecting him to their debts, and thereon adjudged the estate. When the matter came before the court of session, the heir

106. In the case of the next heir's lying out unentered, remedy competent to the creditors.

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heir insisted, that he should be reponed upon minority and lesion; and that he not having passed by, but barely possessed the estate, could not be overtaken by the creditors of the deceased apparent heir, pursuant to the above judgments: and accordingly the court reponed him; but, on an appeal to the house of lords, the judgment was reversed^a. How far that judgment may be a precedent, for the court of session's subjecting an apparent heir, on his bare possession of the estate, to the debts of the interjected apparent heir, may be a question; because, in that case, the peculiarity was, that the creditors, by their adjudications, had a kind of hold of the estate; and, in such favourable circumstances, it was not thought reasonable, by the house of lords, to repon the heir on minority and lesion, it not being deemed a lesion, that he should be subjected to the predecessor's debts, to the value of the estate, tho' he died unentered. But, notwithstanding that circumstance, I should humbly think this a good rule for such cases in general; for, as to the seeming hardship, that the heir, by this means, may be subjected to the value of the estate, when, at the same time, he has no perfect right to it, could not sell or contract debt thereon, it is his own fault that he does not enter, and therefore he cannot claim any advantage from his lying out: and the just rule is, *Quoties per eum fiat cujus interest conditionem non impleri, quod non impleatur, perinde habetur ac si conditio impleta fuisset*, which is particularly applied by the lawier to the case of heirs^b. And this ought more especially to hold now, that, by the late act, there is so easy a method for heirs to compel the superiors to receive them^c: and the particularity, in the above case, does not seem to make any difference; for, if it was law, that the next heir's bare possession could not subject him, the minor ought to have been reponed against the lesion, by those decrees subjecting him contrary to such supposed law.

^a April 1749.
Grant contra
creditors of
Kinminnity.

^b L. 161. ff.
de reg. juris.

^c 20 Geo. II.

107. What if the estate is carried off by the creditors of the next heir in possession.

THIS is only a passive title against the heir passing by, and limited to the value of the estate that was possessed by the deceased. But, if his creditors suffer the estate to be carried off, by the debts or deeds of the next heir, before they constitute their debt against him by decree, in an action upon proving the deceased's three years possession, and the next heir's passing him by, and thereupon affect the estate, they have no remedy; but they may, upon such dependence, inhibit the heir for their security.

108. The triennial possession secures only the onerous or rational deeds of the possessor.

THIS act only operates in favour of the creditors of the apparent heir deceased, for onerous causes, but the next heir is not bound to make good his gratuitous deeds: however, even the rational deeds of the apparent heir, three years in possession, tho' not properly onerous, will be sustained against the next heir that passes him by. Thus, his altering the destination of the estate, from heirs-male to heirs-male, in his contract of marriage, was found effectual in favour of the heirs of provision, and to bar the extraneous heirs-male, to whom, by the former investiture, it descended^d.

^d Edg. Feb. 11. 1724. Muirhead. Hume (passive title) p. 40. Jan. 26. 1726. M. of Clydesdale. Feb. 1727. Mitchell. ^e Hume, (passive title) p. 39. Jan. 1729. lord Halkerton. Decem. 19. 1733. Johnston.

109. What if an investment of annualrent was only in the ancestor; the next heir

THIS act takes place where only an investment of annualrent was in the predecessor's person, and the triennial possession related only to it; for tho' that is not a proper title of possession, yet it is a right in lands, and the act extends to all rights by investment in lands^e.

The

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The next heir has the benefit of discussion; so that all those who represent the deceased apparent heir, whether as heirs or executors, must be first discuss^a; and if he pays the debt, without insisting on such order of discussion, he has relief against such apparent heir's representatives, in any separate estate^b. I shall treat of the passive titles of *Behaviour* as heir, and of *Lucrative succession*, in the subsequent titles.

has the benefit of discussion.

^a Nov. 13. 1712. Vint. Hume decif. 74. id. decif. 75.
^b Hume ibid. Jan. 1727. Marquis of Clydesdale.

THAT creditors of persons deceased may not be disappointed by the apparent heir's lying out unentered, it is provided by statute, "That it shall be lawful to charge him to enter heir to the predecessor within 40 days, or otherwise that he shall be liable, as if he were entered^c." This is termed a General Charge, and serves in order to constitute the debt of the predecessor against the apparent heir; for if, in a process on this passive title of being lawfully charged to enter heir, he does not renounce to be heir, he is liable for the debt, and decree will go against him for payment. However, such decree is only effectual to the creditor at whose suit he is charged, but will not be a passive title in favour of any other creditor; for he may renounce to them, notwithstanding of his having suffered decree to go against him, upon a charge at another's instance.

110. The general charge to enter heir, and procedure thereon.

^c P. 1540. c. 106.

THO' the statute mentions *majors*, yet, by custom, such charges are sustained against minors, even infants. The charging minors to enter heir, and diligence thereon, is supposed legal, by a subsequent statute^d, and was introduced for facilitating the diligence of creditors. Minors may renounce by their tutors, or with consent of curators; and if no renunciation is given in, whereby decree on the passive titles goes out, if they intend afterwards to renounce, they will be restored by way of suspension, at any time within their age of 25 years complete, in common course, as to their persons not being liable, but the diligence of the creditor will be sustained as to the estate. Upon giving in a renunciation in consequence of such charge, decree goes against the heir *cognitionis causa* only, in order to adjudge the estate, and thereon adjudication proceeds of course, the manner whereof has been already observed^e. Tho' the apparent heir was major, yet if decree of constitution, on a general charge, went against him in absence, he may suspend upon a renunciation, which will save him from personal execution; but against a decree *in foro*, before the court of session, he will not be reponed, upon offer to renounce: for, by proponing defences against the pursuer's claim, he subjects himself thereto, if he fails in them. If the heir that is charged to enter has intermeddled with the subjects of the succession, his renunciation will not be received; and if the predecessor's estate is already adjudged for the heir's own debt, he must purge it, before his renunciation is admitted^f; because it is a kind of immixtion, when he suffers the estate to be affected for payment of his own debt.

111. A minor may be charged to enter heir; what if decree proceed against him upon such charge; the effect of a renunciation to be heir.

^d Sup. tit. 2. § 79, &c.

^f Newt. decif. 23.

THIS charge to enter heir, and summons thereon, may be executed against the apparent heir, immediately after the predecessor's death; but the summons on that passive title cannot be prosecuted till the year and day expire; and further, the days of the charge and of the summons must be elapsed after the year, before the action can

112. A general charge may be served within the annus deliberandi; can inhibition be

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raised there-
on.

be insisted in. This practice of executing the charge within the year seems not to have countenance from the statute ; but I conceive it was introduced, that inhibition might be served upon the charge ; which seems to have been customary of old, and was once sustained, some years since, as to the particular debts libelled on in the charge and inhibition^a ; for tho' the charge to enter heir might have been executed within the *annus deliberandi*, yet the summons thereon could not, by the antient form, be raised till after the year and day^b. There does not seem to be occasion for such procedure now ; because the heir is disabled from disposing the predecessor's estate for a full year after his death^c.

^a Feb. 17.
1713. Li-
vingstone.
^b Spotisw.
(heirs) Li-
vingstone.

^c P. 1661.
c. 24.

113. The ge-
neral charge,
and summons
on that pas-
sive title may
be served at
the same
time.

By the present usage, a general charge to enter heir, and a summons on the passive titles, particularly on that of a charge to enter heir, may be executed at the same time. This is not precisely consistent with form, since a summons on that passive title supposes the charge to have been given, and therefore regularly it ought to have been used before raising the summons. But the present course is expeditious, and without damage to the defender, and tends to the pursuer's security ; for inhibition may presently be used on the executed summons, which, by the late regulations, must be libelled before it is executed. The inhibition will secure the creditors that use it, against any deeds affecting or conveying the estate, which otherwise might be granted immediately after the expiration of the year. And therefore there is no reason at all for allowing inhibitions on the general charge, even where the debt inhibited for is specially mentioned in the charge : for it is plain, a general charge to enter heir does not create a depending action, which, on a deed not granted by the party himself, can only found an inhibition.

114. Of a
special
charge, and
a general spe-
cial charge.

THE general charge to enter heir is Personal, in order to constitute the debt against one, as if he were served heir in general ; therefore if decree of constitution goes against the heir, who is not entered, there must be a special charge against him to enter to the lands, or other heritable subjects that belonged to the predecessor, and wherein he stood infest, and devolves on him as heir, within 40 days^d ; or, if it is a debt of his own, he may be charged to enter to the subjects descending to him, as heir in special, within 40 days, with certification, that, if he fail, the like diligence shall be competent against the estate, as if he was entered^e. The special charge is directed against the estate, and supplies a special service. Where the ancestor had a personal heritable right in him, as a disposition to lands without infestment, the heir must be served with a special charge to enter heir in that particular right, in order to adjudge the same ; for a special charge to enter to the lands, in which the ancestor was not infest, would be inept and ineffectual^f : this is sometimes called a General Special Charge, not without some impropriety. In the case of a special charge, whether to enter to the lands, or to a personal right, there can be no place for a renunciation, the defender being already subjected to the debt ; which is either his own, or his predecessor's for which decree of constitution has gone against him, and a renunciation to be heir is only in order to liberate the defender from

^d P. 1540.
c. 106.

^e P. 1621.
c. 27.

^f Hume
(charge to
enter heir)
July 10.
1737. Mon-
ro.

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from the representation of his ancestor, on the passive title of General charge to enter heir; and so it cannot obtain in the case of a special charge, the intent of which is to subject the heritable estate to the pursuer's diligence, for payment of a debt to which the defender is liable.

^a Sup. tit. 2. § 79, &c. AFTER expiration of the days of the charge, an adjudication may be raised and carried on against the estate, as if the heir was entered, concerning which I have likewise treated in the above quoted place ^a. If he dies before decree of adjudication, the charge, and all that followed upon it, falls like a special service without infeftment.

115. An adjudication upon a special charge. If the defender die before decree, the charge and consequents fall.

Observations on the Law of England, in relation to the Premises.

^a Coke 1. instit. 8. ONE cannot be heir till after the death of his ancestor, and in his life he is called his Heir Apparent, in the law of England ^a. If such heir, in his father's life, make a feoffment of his father's inheritance to another, this passes an estate during the son's life; for it is a disseisin of the father, and the son, after the father's death, cannot avoid it; for no man can alledge an injury in any voluntary act of his own. It is otherwise, if he bargains and sells his father's inheritance in his father's life, or if he releases to a lessee, in order to convey the estate; for this is void, because he hath no right to transfer: but if he releases with Warrantee, he and his heirs are for ever barred by rebutter ^b. In such case the heir would be barred from challenging his own deed, by our law, without any express warrantice; for there is always implied warrantice against future facts and deeds, and no man can be allowed with us to counteract his own deed. The case would be otherwise, if one made a conveyance "for all right, title or interest he has in the subject;" for then he might claim the estate upon any right supervening thereafter.

1. One next in succession, called heir apparent in his ancestor's life; what deeds executed then by him, relating to the estate, good.

^b Bac. new abr. (heir and ancestor) 24.

^c Reg. maj. lib. 2. c. 25.

^d Broet. lib. 4. tract. 3. c. 70.

^e Coke 1. instit. 15. 1. rep. 93, &c.

THE service of heirs with us, upon a brieve of mortancestry, is very different from what obtains in England. I find it mentioned in our old law books, as our established law antiently, as at this day ^c. Whereas in England, an assize, or writ of mortancestry, is only necessary or used, when a stranger Abates or Intrudes, between the death of the ancestor, and entry of the heir into the lands whereof the ancestor died seised, in order to ascertain the heir's right against such abator, or other stranger who intrudes into the possession ^d; but it is not used upon other occasions. All that the heir, by the law of England, does to vest himself with the right, is to take actual possession of the lands wherein his ancestor died seised, which is done by receiving the rent, or otherwise by manurance, and entering into the natural possession of the same, labouring and sowing it ^e: this is called the heir's Entry to the lands.

2. In what cases is a writ of mortancestry necessary; the entry of an heir is accomplished by his taking possession.

BUT tho' there is a great diversity between the manner of an heir's vesting himself with the right of his ancestor's lands in our law, and that of England, yet the effect is almost the same; for, without such entry, the husband of an heiress will not have the courtesy, either by the law of England or our law. But, if the succession opened to the husband, he is said to have a seisin in law, before his entry, in

3. A seisin of an heir, either in fact or in law; this last good to intitle to dower, but not to the courtesy.

order

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order to intitle the wife to her dower ; because it is the husband's fault that he did not get his wife seised of the lands, in order to intitle himself to the courtesy ; but it cannot be the wife's fault that he did not enter into his own estate ; and because it was not in her power to bring the husband's seisin in law to an actual seisin or possession, she shall be endowed of the same ^a. Our law does not allow a wife her dower or terce of lands, in which the husband was only apparent heir when he died ; for we do not call the descent of the lands upon the heir a seisin in law ; it only gives him an apparency, or liberty to make up a title to the same.

^a Coke 1. instit. 29, 31.

4. The entry of an heir makes the lands descend from him to his next heir.

AN entry does likewise make the lands descend to the party's heir, which otherwise they would not. For example, A father seised of lands has a son and daughter by one venter, and a son by another venter, and dies, the eldest son is his heir ; but if he dies before entry, his brother of the half blood will succeed therein as heir to his father ; whereas, if the eldest son had entered, and died without issue, his sister of the whole blood would have succeeded as heir to him, both by the law of England ^b, and Scotland.

^b Coke 1. instit. 11.

5. An heir only liable to the creditors, to the extent of the assets, or subjects descending to him from the ancestor ; what are accounted such.

WE observed, in the preceeding title, that an heir, by the law of England, is liable only to his ancestor's debts or deeds, to the extent or value of the lands descending to him, called Assets by descent. A right, without any estate in possession, reversion or remainder, is not assets by descent, to subject the heir, till it is recovered and reduced to possession : thus, a reversion after a term for life or years is effectual assets, only *quando acciderit*, and the heir cannot, upon a bill in equity, be compelled to sell it ; but the creditors must expect till the same falls ^c. The equity of redemption of a messuage is assets as to the surplusage, and, by statute, trust in an inheritance is made assets at law ^d. The whole subjects of the inheritance may be affected by the creditors of the deceased, whether the heir is in possession of the same or not, by our law.

^c Vin. (assets) 141, &c.
^d 29 Cha. II. c. 3.

6. Lands in Ireland deemed assets, but not so as to lands in Scotland ; does this last obtain, notwithstanding the union.

LANDS in Ireland are assets to satisfy a bond-debt in England ; but it is said to be otherwise of lands in Scotland^e. This was found in a case before the union of the two kingdoms ; and as there is no alteration thereby as to processes or judicial proceedings, the law may seem to continue the same at this day. And, by the same rule, one's inheriting an estate in England cannot subject him, before our courts here, in payment of the debts of his ancestor whose estate he so enjoys. This inconveniency on both sides would seem to require the interposition of the legislature to remedy it.

^e Vin. ibid. p. 142.

7. The heir chargeable upon a judgment, in default of chattels ; but not chargeable for a bond, unless the ancestor has bound himself and his heirs ; the

THE heir, having assets, shall be charged upon a recovery against the ancestor, in default of chattels, for the land is charged by the judgment. The case is otherwise as to a bond-debt, with which the executors only, and administrators, but not the heir, shall be charged, unless the ancestor therein bound himself, and his heirs ^f. It is only the land that descends, which is subject to the judgment ; for, in an action of debt against the heir, if he confesses the debt, and shows the certainty of the assets, which he has by descent, neither his body, his goods, or his other lands shall be chargeable to the

^f Littl. 734. et ib. Coke.

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the debt, but only the land by descent; and the judgment shall be to recover the debt to be levied out of these lands, and he is only chargeable as *Terre-tenant*, or possessor of the same. But, if the heir pleads *Riens per descent*, That he enjoys no lands by descent, or does not show the certainty of them, and it is found against him; the judgment shall be general to recover the debt, and not special, to recover it out of the lands descended; and, in such case, he shall be liable for the whole debt, tho' the value of the lands should not amount thereto^a.

land by descent regularly only chargeable.

^a Vin. (heir) p. 241, &c.

THE reason why heirs are not liable in personal obligations, except where the party "binds himself, and his heirs," expressly; and that the executor having assets, tho' not named, is chargeable, is, because, by the common law, the goods and chattels of the debtor only, and the annual profits of his lands, as they arise, and not the land itself, were subject to execution for debts and damages; and those being the security on which the creditor depended, they are liable in the hands of the representatives of the debtor, *viz.* his executors. The lands were thus reserved from the personal contracts of the tenant, that he might be the better able to answer the feudal duties to the lord; and therefore, as the lands were not originally liable in the hands of the obligor, much less can they be subjected in the hands of the heir, who was not comprehended in the contract^b. There is an exception as to debts to the king, for the heir is bound, tho' not named, in these obligations, in respect of the royal prerogative^c. If one bind his heirs, without naming himself, the obligation is void, because the granter was not bound^d.

8. Antiently, by the common law, only the chattels and annual profits of the debtor's land, but not the land, subject to execution for debt; hence the heir not liable where not mentioned, except in bonds to the king.

^b Bac. new abr. (heir and ancestor) 25.
^c 33 H. VIII. c. 39.
^d Coke 4. rep. 22.

By the common law of England, if the heir aliened the land he had by descent, (to the extent of which alone he is liable, even where he is comprehended in the obligation) before action brought against him by the creditor, the obligee was without remedy: as also, if the debtor had devised away the lands, no action lay either against the heir or devisee. Both those hardships are remedied by statute^e, and the heir is subjected to the extent of the value of such lands, as if the same were his own proper debt. But the lands, *bona fide*, alienated before action brought, are not subject to execution. And the act declares, "That all wills, dispositions, or appointments, concerning any lands, shall be taken to be fraudulent, and void and null, as against the creditors of the testator; and they shall have action against the heir and devisee jointly, in virtue of the statute; excepting devises of lands for payment of any real or just debt, or for raising portions to children, pursuant to a marriage-settlement."

9. Of old, if the testator devised his lands, or the heir aliened them before action by the deceased's creditor, he was without remedy; this rectified by statute.

^e 3 and 4 W. and M. c. 14.

THO' the debtor is prevented by this statute from defeating his creditors, who are secured against any imposition which might be practised on a man in his last sickness; yet any settlement or disposition he shall make in his lifetime, whether voluntary (*i. e.* gratuitous) or not, shall be good against bond-creditors, who have no lien upon the lands; for such deed prevents the descent of the same upon his heir, and consequently takes away the remedy the creditors had against him, he being only liable in respect of the lands descended to him^f.

10. Bond-creditors who have no lien upon the lands, not secured by the statute.

^f Bac. new abr. ibid. 28.

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By our old law, the heir was always universally liable to the creditors of the ancestor, after discussing the executors or failing moveables^a; but, by our present law, the heir may enter upon inventory; and it is regularly optional to the creditor to sue either heir or executor.

^a Reg. maj. lib. 2. c. 39. § 3.

11. Lineal heirs are those to whom a fee-simple goes; heirs-parceners such; the eldest son comes into his mother's place.

HEIRS of line inherit, by our law, where a right is "to one and his heirs, or his heirs whatsoever." This, in the law of England, is called a Fee-simple, and goes to the lineal heirs. If the tenant die, leaving only daughters or sisters, they all succeed equally, and as one heir, and are called with us *Heirs-portioners*, and in England *Heirs-parceners* or *Co-parceners*; and may be compelled to make partition, by a writ *de partitione facienda*, directed to the sheriff, and with us by a brieve of division. There is little difference between the law of England and Scotland in that respect; for in both, if one of the parceners die, her eldest son succeeds as heir-parcener with her aunts; and, if she leave only daughters, they all come into their mother's place, as one parcener with them^b. I shall observe, what seems different in the law of England, in this judicial partition, from what obtains with us.

^b Littl. 241. et ibid. Coke.

12. Homage and fealty go to the eldest, and likewise a castle for defence, without any recompence to the rest; other indivisible inheritances, as a common, estovers, &c. go to the eldest, but under contribution to the rest.

HOMAGE and fealty, as an indivisible right, go to the eldest heir-parcener, other indivisible inheritances, as common, estovers, piscary, &c. go likewise to the eldest, but the rest shall have contribution for the value. A castle, for the defence of the realm, does not fall under partition, and goes to the eldest, but without any recompence to the rest: however, a house of habitation for private use, and not for the necessary defence of the realm, ought to be divided among co-parceners by chambers or rooms^c.

^c Coke 1. inst. 164. 165.

I HAVE shown in the foregoing title, how the case stands by our law, as to superiorities descending to heirs-portioners, and likewise with respect to the mansion-house and gardens. And as to titles of peerage, I have set forth elsewhere^d, both the law of England, and ours, in the case of heirs-female succeeding to a peer. As to a common, I can't see, but it must belong to the heirs-portioners with us, according to their proportions of the grounds to which it is appurtenant.

^d B. 1. tit. 2.

13. A judicial partition.

IN a judicial partition by writ, the judgment shall bind infants and femmes-covert, and it is in the sheriff's discretion which part to allot to each, without allowing the eldest the first choice^e.

^e Bac. ibid. 415.

14. How far infants bound by a voluntary partition among heirs-parceners.

DIVERS methods of partitions by consent, or voluntary partitions among heirs-parceners, are mentioned by Littleton^f. As to which, I shall only take notice of one remark made by him, and enlarged upon by lord Coke, in his commentary, *viz.* That if one of them is under age, at the time of the partition, she shall be bound thereby, in case it is equal; because she is compellable by law to make partition, and cannot plead her age against it; and tho' the voluntary partition be unequal, and the infant have the lesser part, yet the partition is not void, but voidable only upon her entry; and, if she take the whole profits of the unequal part, after her full age, it is made good for ever^g.

^f Sect. 243, &c.

^g Littl. sect. 258. et ibid. Coke.

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I DOUBT not, but our law is the same in that respect; for deeds, by a minor, with consent of his curators, if he has any, or without it, if he has none, are not void, but voidable only in case of his enorm lesion. And, as to the pleading of age, it is only competent to a minor, where the right of his ancestor is called in question, and so is not good against a suit, for division of the estate among heirs-portioners.

* Littl. 275.
et ibid. Coke.

If one who has only daughters give part of the lands to one of them, she shall notwithstanding have her share with the rest in the remaining lands^a; except where one of them is married, and the father gives part of his lands to the husband, with his daughter in frank-marriage, for then she cannot have any share with her sisters in the remanent lands; unless she and her husband put the lands, given in frank-marriage, in hotch-pot, *i. e.* mix and mingle them together with the remanent lands, that the value of the whole may be known, and an equal partition be made accordingly. But the lands given in frank-marriage, tho' exceeding the remanent lands, may be retained by the husband, who is not compellable to bring the same into hotch-pot, since the father had full power to dispose of his lands as he pleased^b; unless, in right of his wife, he insist for a share in the remanent lands.

^b Littl. 266,
&c. et ibid.
Coke.

15. One of the heirs-parceners getting a part of the inheritance, how far bound to bring it into hotch-pot.

ONE may, by our law, take his estate To himself, and his heirs-male, without limiting them to those of his body; and it would go to heirs-male, *i. e.* males connecting their propinquity to the deceased by males, in the remotest degree, in exclusion of his heirs of line, tho' much nearer by right of propinquity, or right of representation. But, by the law of England, if one give lands to another, *To have and to hold to him, and his heirs-male*, he to whom such right is made, has a fee-simple; because it is not limited, of whose body the issue-male shall be, and none can create a new kind of succession. And, if the king should make such a grant of lands, the grant would be void, for that the king was deceived in his grant, inasmuch as there can be no such inheritance of lands and tenements, as the king intended to grant. But if the king, for reward of service, should grant armories or arms To a man, and his heirs-males, without saying, *Of his body*, this is good, and they would descend accordingly, even to his remoter heirs-males^c.

^c Littl. 31.
et ibid. Coke.

16. Lands settled to one, and his heirs-male, without limiting it to those of his body, a fee-simple; what if the king make such grant.

Observ. B. 2.
tit. 3.

^c Littl. 32.
et ibid. Coke.

WHERE one grants lands "to one, and the heirs, or, heirs-male of his body," it is a general tail; but, if the lands are given "to him, and the heirs or heirs-males of his body with a certain woman," it is a special tail, and while the woman lives he is tenant in tail, and may suffer a common recovery, in order to break the entail, as formerly mentioned^d. If the wife outlive him, she has an estate for life. But, if she predecease without issue had, he, after the wife's death, comes to be *Tenant in tail, after possibility of issue extinct*; because, by no possibility, he can have any issue inheritable to the estate-tail. In this state he is almost no better than a tenant for life^e, except that he is disputable for waste, or not answerable for waste committed by him upon the estate. With us likewise, where lands are conveyed To husband and wife, in conjunct-fee and liferent, and to the heirs to be procreated

17. Tail general and special; tenant in tail, after possibility of issue, extinct.

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procreated betwixt them, we esteem one of the parties to be *fiar*, and the other *liferenter*; and, in case of issue, they serve heirs to the *fiar*, and, in default of such issue, the other heirs of the *fiar* inherit the lands, and his or her debts and deeds alone can affect them. The husband is holden to be *fiar*; unless circumstances occur to determine the fee to the wife.

18. The creditor who gets the first judgment against the heir is preferable.

It is likewise a rule of preference by the law of England, That not the creditor who commences his action first, but he who obtains the first judgment against the heir is preferred; because the land is bound by the judgment^a. But, by our law, no judgment against an heir, or any other judgment, except a decree of adjudication of the lands, where the proprietor, or his heir, is called as defender, gives any preference, or creates any lien upon the land.

^a Vin. (heir) 247.

19. Originally the obligor's chattels and profits of his lands only subject to execution for his debt, but not the lands; why the lands descending to the heir subjected.

By the common law of England, where one did sue on a recognizance, or judgment for debt or damages, he could not of old have the body of the defendant or his lands in execution; but only his goods and chattels, by a writ called *Fieri facias*; or his corns or other profits of his lands by a *levari facias*; but thereafter personal execution, by a writ of *Capias ad satisfaciendum*, was given by statute^b. And, by another act^c, the *Elegit* was given of the moiety of the lands, which was the first act that subjected lands to the execution of a judgment, or of a recognizance, which is of the nature of a judgment. And thereafter, it is provided by the several acts introducing statutes, merchant and staple^d, That, in virtue of the same, all the lands which the connusor, or person acknowledging the same, had at the day of the connusance or recognizance, shall be Extended, in whose hands soever they afterwards come, either by feoffment, or other manner. But, in debt against the heir, upon an obligation made by his ancestor, "binding him and his heirs," the plaintiff, by the common law, has all the lands which descend to him in execution; because the common law gave no action of debt against the heir; and, if the creditor could not have execution of the land, his action would be fruitless, for the goods and chattels of the debtor belong to his executors and administrators^e.

^b Westm. 2. c. 45.
^c Westm. 2. c. 18.

^d 13 Edw. I. de mercat. 23 H. VIII. c. 6.

^e Coke 3. rep. 12, &c.

20. If the grantor of a statute or recognizance alien part of the lands thereafter; the heir chargeable as terre-tenant, as to the residue.

WHERE the person that acknowledges a recognizance, or a statute, conveys part of his lands thereafter, by either onerous or gratuitous deed, and suffers the residue of them to descend to his heir, if execution is sued against the heir, he shall not have contribution against the purchaser, tho', in such case, the heir is charged only as terre-tenant, or holder of the land^f, and not as heir; for, by the nature of a recognizance or statute, the connusor himself only is bound, and the lands out of which he consents that the sum be levied. But the heir, in the above case, is solely subjected; because he comes to the land without any valuable consideration, and is understood to be the same person with the ancestor.

^f Coke ibid.

21. More debtors in a recognizance or statute, or heirs to such

AND if one bound in a recognizance have two daughters, and dies, and they make partition, one alone shall not be charged, but shall have contribution against the other; or if some of his lands descend to his heir on the part of his father, and some to his heir on the part of

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of the mother, the one alone shall not be charged; and if he be, he shall have contribution from the other. And indeed the same rule holds among the connufors themselves, that there shall be an equal charge, and the land of one of them only shall not be extended; so that more persons entring into a recognizance or statute, must be all charged together, and likewise all their heirs together must be charged; or if one submits to a charge for the whole, he has contribution from the rest proportionably^a. Where one dies leaving different heirs, there is a certain rule by our law in discussing them, set forth in the foregoing title, unless in the obligation benefit of discussion is renounced; which, for most part, for the ease of the creditor, is done, but but that does not prejudice the relief competent among heirs.

^a Coke ibid. Vin. (heirs) 245.

NOT only lands, tenements and hereditaments, but likewise leases and sums due upon wadsets, and all securities upon lands, or issuing out of them, go to the heirs with us. In this case there is a diversity between our law, and the law of England by which leases, and sums due upon mortgages, as chattels real, go to executors and administrators, as was formerly observed at large^b.

^b Obfer. B. 1. tit. 3. b. 2. tit. 9.

CONDITIONS and covenants real, or such as are annexed to estates, descend to the heir, and he alone shall take advantage of them, and that whether there are express words in favour of the heir or not; for the law, by implication, reserves the condition to the heir of the feoffor, that he may take the same advantage that his ancestor whom he represents might; and in like manner the heir shall be bound by all such conditions as run with the land, whether they were annexed to the estate by the feoffor or grantor, or his immediate ancestor or not^c. The heir is intitled to any real action in right of his ancestor, but cannot regularly bring any personal action upon grounds that were competent to the ancestor, with whose personal contracts he has nothing to do. If an erroneous judgment was given against the ancestor, by which the heir may lose the lands which it affects, he may bring a writ of error, or of attain in relation thereto^d.

^c Bac. new abr. (heir and ancestor) 24.

^d Bac. ibid.

WHEN one seised of lands is disseised, and the disseisor dies seised, and the lands gained by the disseisor descend to his heir; this descent shall toll or take away the entry of the disseisee, and oblige him to sue a writ of entry, *sur disseisin*, against the heir, because the freehold is cast on him. The notions of the law do make this title to him, that there may be a person in being to do the feudal duties to fill the possession, and answer the actions of all persons; and therefore the law that gives him this right must defend his possession against any other, till it be evicted by judgment, which being the act of law, may destroy the heir's title. But, in the times of domestic war, such descent shall not take away entry, for then the disseisee would be without all remedy, in the mean time, there being no court open wherein to bring his action^e.

^e Bac. new abr. (descent) 36. 41.

THE entry may be preserved by continual claim, *viz.* where a man, who hath right and title to enter to land, makes a continual claim to them before the person die seised of the same. But, in the case both of entry and claim, he ought to take possession where he can;

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because

debtors must be all charged together; and, if one submits to the debt, he has contribution from the rest.

22. Mortgages and leases go to executors and administrators.

23. The heir is intitled, and subject to all conditions that run with the land; what is his case as to personal actions.

24. If the disseisor die seised, the descent of the freehold is cast upon his heir, and it takes away the entry of the disseisee.

25. How the entry secured by the disseisee's continual claim, or otherwise.

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because it is the change of possession that makes the notoriety in both cases; but, if the disseisor menace to hurt him, then the law allows him to make his claim as near the lands as he dares to come. If a man is disseised, and the disseisor continues 30 years in possession, without any claim made by the disseisee, yet if the disseisee at last make his claim before the death of the disseisor, it shall secure his entry for five years, after such claim made. But, if five years are suffered to elapse, after the claim made, it will exclude his entry; for, by the statute, if the disseisor hath been in possession of the lands, without the disseisee's entry or continual claim, his dying seised shall take away the entry of the disseisee^a.

^a 32 H. VIII.
Bac. new abr.
(descent) 41,
&c.

26. As to infants and femes-coverts, entry not taken away by such descent; what if the disseisor die, leaving his wife with child, and another abates.

As to infants and femes-covert, their entry is not taken away by descent upon the heir of the disseisor. But, if a man die seised of fee, his wife *priviment ensceint*, or with child of a son, and a stranger abates and dies seised, and afterwards the son is born, he is bound by the descent; because, at the time of the descent, he had no right to enter, not being then in *esse*, and, by consequence, had no wrong then done him; and the lord had none to avow upon, for the services, at the time of the descent^b. In such case our law would save this infant's right of entry, in the same manner as if he had been born before his father's death; for, as is elsewhere observed, a child in the womb is holden as already born, in cases where his own interest is concerned^c; and he is undoubtedly in *esse*, or in being at the time, *viz.* in the womb.

^b Bac. new
abr. (descent)
441.

^c B. 1. tit. 2.
§ 7.

27. Disseisin, abatement and intrusion; the difference between them as to continual claim.

A DISSEISIN is, "where a man enters into any lands or tenements, and his entry is not congeable, and ousts him who hath the freehold." Abatement is, "where a stranger enters into lands, of which an ancestor died seised before the heir has entered." Intrusion is, "Where an ancestor dies seised of an estate of inheritance, expectant on an estate for life, and then tenant for life dies, and between the death of the tenant, and entry of the heir, a stranger interposes and intrudes. In these two last cases, there is rather a prevention of the heir's entry, than an actual ouster of his freehold. The rules and laws concerning continual claim, and effects of it, hold as well in relation to abaters and intruders, their donees and feoffees, as in relation to disseisors, their donees and feoffees. But it is said, that the above statute of Henry VIII. does not extend to them, so that the continual claim must be made within year and day, to preserve the entry, as was the rule by the former law, even as to disseisors^d.

^d Littl. sect.
414. et ibid.
Coke. Bac.
new abr.
(disseisin) 97.

T I T. VI.

Gestio pro hærede, or Behaviour as Heir.

1. Gestio pro hærede, derived from the civil law, twofold principally, 1. Intromission with heirship-moveable.

THE lawful entry of an heir gives him an active title or right to the subject, and likewise infers a passive title against him, of being liable to the predecessor's debts, in manner above related. But the heir who immixes himself with the inheritance, without order of law, subjects himself by such deed to the creditors of the deceased, by the passive title of *Gestio pro hærede*, or Behaviour as heir, tho' he shall never make up any active title or right to the estate. Behaviour

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^a L. 20. pr. ff. de acquir. vel omit. hæred.

viour as heir, or *gestio pro hærede*, is derived to us from the civil law, where it is described to be "one's acting, as if he were heir, when he is called by the testator, or the law, to the inheritance^a." Among the Romans, there was no diversity between the succession in heritable, and that in moveable subjects, but the whole promiscuously might be given away in testament, by one's constituting of heirs; or, in the case of intestates, were carried to the heir by act of the law, and so the party's intermeddling with the one or the other did subject him. But, as such distinction obtains with us, Behaviour as heir generally concerns heritage, or things deemed heirship, and so is inferred only by the party's intromission, who is apparent heir in the subject. It consists principally of two branches, 1. Intromission with the Heirship-moveable of the deceased, which, in this view, is adjudged heritable; it is only competent against the heir of line, to whom only the heirship-moveable belongs. 2. Intromission with the rents of the lands, wherein the intromitter is apparent heir.

². With rents of lands.

^b July 13. 1631. Gath.

^c P. 1474. c. 53. leg. burg. c. 125.

^d L. 21. § 2. ff. de acquir. vel omit. hæred.

INTROMISSION with heirship-moveable is an undoubted behaviour, when the heir of line draws, and separates it from the rest of the moveables, for that is a direct acting under the character of heir^b; but it is likewise inferred from the heir's possessing, without any other title, such moveables, out of which heirship may be drawn, if the possession is long continued, and no warrant from a judge is obtained for the entry to possess. An inventory of such goods, out of which heirship is due, is insert in the borow-laws, to which reference is made in the statute^c. But to this must be added the best of several particulars of silver-work, and other furniture in use by the politeness or luxury of the present times, which were not accustomed at the date of the old act. This passive title is not inferred from the heir's possessing such goods as he got from the deceased, in place of his heirship, which he renounced at the time of his getting these goods; for he could not behave as heir to a person in life. One's behaviour as heir can only take place in such circumstances as he could directly serve heir to the party, or renounce being heir to him; which cannot possibly be till after the ancestor's death, when the inheritance descends, *cum hæreditas delata est*^d, as the law speaks.

². Intromission with heirship-moveable.

^e Nov. 28. 1623. Rigg.

ONE may defend himself against the passive title of Behaviour, by intromission with heirship-moveables: 1. In respect the deceased could have no heirship, as not being baron, prelate or burghers. *Baron* is one infeft in lands, tithes or annualrents; and, if he is proved to have been once infeft, he is presumed to continue so till his death; unless it is proved that he was denuded; which is the only meaning of the common maxim, *Semel baro semper baro*. But, tho' it is proved, that the deceased was once a beneficed person, or trading burghers, it will not do, unless it is likewise proved, that he continued such till his death. Every beneficed person is intitled to heirship, tho' not a prelate, or one of the dignified clergy^e, in the same manner as one infeft in a small tenement, or even in an annualrent, is deemed baron to that effect. And, by the same rule, our stipendiary ministers, who have the whole allowances appointed for the incumbents, must be esteemed Prelates, as to the effect of heirship; for otherwise it might happen, that we should have no clergymen intitled

³. This takes no place, unless the deceased was intitled to heirship; persons intitled to it.

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intitled to it, since most of our ministers are, and all may be, reduced to the state of stipendiaries. A stipendiary minister sure is equal, if not superior in dignity to a trading burges: and the intendment of the law seems to be, that people of respect should have that privilege, in order that their heirs may be in some condition to set up a family. The heir of an apparent heir of a baron, who had a disposition to the estate, but was a collateral, is not intitled to heirship, unless the deceased died infest on such disposition^a. Nor has an honorary burges that privilege, but he must, at his death, be an actual trading burges. But, to be sure, one that is a burges, and gild-brother, by his admiffion, is intitled to it, since thereby he has all the privileges of the burgh, in the same manner, as if he were an actual merchant; whereas, an honorary burges has nothing but the bare name and title, without any benefit by his nominal burgership^b. I shall add no farther to what I have said on this head elsewhere^c.

^a Decem. 22.
1674. heirs-
portioners of
Seaton.

^b Spotif. title
(heirs) Leslie.
^c Sup. tit. 4.
§ 6.

4. The difference between this passive title, and that of vicious intromission.

THE difference between this passive title, and vicious intromission, is, that the possessing and using such subjects for a long time, as are deemed heirship-moveable, tho' without disposal of them, is construed a Behaviour, which is founded on the presumed intent of the party, or *animus gerendi*. For, as Ulpian expresses it, *Pro hærede gerere, non tam facti quam animi est*^d; whereas, vicious intromission requires an actual disposal of the things, that passive title being inferred only from the presumed embezzlement, and in this respect it imports, whether the deceased was intitled to heirship or not^e.

^d L. 20. pr.
ff. de acquir.
vel omit. hæ-
red.

^e July 14.
1626. John-
ston. Jan. 17.
1627. Frazer.

5. This passive title excluded by the deceased's dying registered at the horn, or attainted of any capital crime.

ANOTHER defence against this passive title, as well as against vicious intromission, is, That the deceased could have no heirship, as That he died rebel, *i. e.* an outlaw, or registred at the horn, and that his escheat was declared before the intromission, at least before the intending the pursuit: or, if the gift is taken to the intromitter himself; or the donatary, from whom he has right, is in possession, it will defend without declarator, which is not needful, when one attains possession without it^f. And, doubtless, the deceased's being attainted of any capital crime will have the same effect, for thereby all his moveables are forfeited to the crown.

^f June 10.
1674. lady
Spencerfield.
Feb. 10.
1676. Grant.

6. It is likewise barred by an universal executor's confirmation.

IN like manner, this passive title, as that of vicious intromission, is excluded, if there is an universal executor confirmed *qua* nearest of kin, and the goods in question given up in the inventory, before the pursuer commenced his action; for, tho' the heir might hinder the confirmation, by claiming the heirship, yet his very suffering them to be confirmed with the other goods, sufficiently excludes behaviour. But, as it is provided, that the confirmation of an executor-creditor cannot defend against vicious intromission, so, it would seem, that it should not against Behaviour, unless, in terms of the statute^g, the intromitter had a warrant from the executor; or, at least, it must infer vicious intromission, which is equivalent.

^g P. 1696.
c. 20.

7. Warrant from a judge to intermeddle, excludes this passive title.

IT is likewise, in the last place, a good defence against behaviour, by intromission with heirship, That the heir had warrant to possess the goods from the proper judge, in consequence whereof he inventoried them; but, if he possesses others not inventoried, of considerable

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able value, it may presume behaviour. However it would seem, that unless they were *dolose* omitted or embezzled, the simple possession of things not inventoried, should not infer behaviour; because the *animus*, or party's intent there, was not to behave.

^a P. 1695.
c. 24.

THE other principal branch of behaviour, and which is common to all heirs, is Their intromission with the rents of the lands wherein they are apparent heirs to the deceased. This, by the late act ^a, is extended to all intermeddling with the rents, or possessing the estate by any other title than as highest bidder at a public roup before the lords of session, as I observed in the preceeding title.

8. The other branch of this passive title; intromission with the rents of the deceased's estate.

IF such titles are purchased by the heir in the predecessor's life, as intirely denuded him of the right to the estate, and that thereon possession was attained, it seems impossible, that the party continuing to possess, in virtue of them, can subject him to a passive title by this statute; because it mentions only the case, Where the heir could have entered heir to the predecessor in the estate, which necessarily supposes, that the predecessor was not denuded at his death; and indeed, in that case, it is no longer the predecessor's estate, but the purchaser's.

9. How the possession of the ancestor's estate subjects the apparent heir by the act 1695.

^b June 7.
1710. Watson. Dal.
Nov. 24.
1714. Mercer.

IT is true, where the apparent heir, in his predecessor's time, acquires diligences affecting the estate, and possesses in virtue thereof, after his death, the statute will take place against him; for still it was the ancestor's estate, and the predecessor in possession at his death: in this sense only I can understand the decisions on this act to this purpose ^b. It is quite otherwise, when the ancestor is intirely denuded of both right and possession; for, if the acquisition is for onerous causes, even prior creditors cannot affect the purchaser; but, if it was gratuitous, the passive title of *Succesor titulo lucrativo post contractum debitum*, only can take place, of which in the next title.

^c Feb. 15.
1711. Dick.

NOR only will the heir's possessing the predecessor's estate, in virtue of titles acquired, as above, subject him to this passive title; but likewise his concurring in the sale of any part of it, with those who had rights and diligences upon it, will infer the behaviour against him, introduced by this statute, if it appear, or is presumed, that part of the price was applied to his behoof ^c. This will be still clearer, if he becomes expressly bound in the warrandice, for then he is in effect the seller himself. But where the estate is provided to heirs-male, the heir of line's getting a gratification from the heir-male, for renouncing all pretensions; or doing any deed, whereby no right is communicated or aliened, which could have been affected by the creditors, will not infer behaviour ^d; because, neither was the ancestor's estate descendable to the lineal heir, and consequently, his directly possessing the same could not have inferred behaviour; nor was any right transmitted, whereout the creditors could have operated their payments. The rule in such case laid down is, That the person must not only have the name, but the right of an heir, when he intermeddles *Pro heredede geri dicendum est, quotiens quis accipit quod citra nomen, et jus heredis accipere non poterat* ^e.

10. In what cases does the heir's concurring with adjudgers in a disposition of the estate, or the heir of line's accepting a gratification from the heir-male, infer it.

^d July 5.
1666. Scot.
July 19.
1676. Nevay.

^e L. 20. § 4.
ff. de acquir. vel omit. hered.

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11. What if the estate is possessed by adjudgers.

BUT if the apparent heir suffer the estate to be possessed by adjudgers, for his own, or any other person's debt whom he represents, it will infer behaviour^a; that being the same thing as if he possessed it directly himself, since it is possessed on his account: but his purging the estate of these debts will exoner him.

^a D. decif. Nevay.

12. A roup, at the suit of the apparent heir, of the predecessor's estate, before the court of session.

By the foresaid late statute, the apparent heir is allowed to bring the predecessor's estate to a roup before the court of session, whether it was bankrupt or not. This was just and necessary, since, in the preceeding part of the act, it was declared, "That the heir's possessing the estate, otherwise than as the highest offerer at a public roup before the lords, should subject him to the passive title of behaviour." In this case the ranking of the creditors need not precede the sale; (as in other cases it must^b) because it was proper not to delay the finishing the sale, that so the creditors might forthwith know how far they could expect payment, and likewise the heir, whether he should have any reversion.

^b Regulations 1695. § 26.

13. What title required to the heir, as to the overplus of the price.

WHEN the heir, in such case, is purchaser himself, if the price exceeds the debts, he retains it, and is answerable to the creditors for the same, to the extent of their debts, and the overplus is his own, and his infestment on the decree of sale is in place of an entry. But if a stranger purchase, then it may be doubted, If the overplus of the price can be received by the heir, unless he make up a title to it, at least by a general service; but that were to involve him in a representation of the ancestor, which it was the intent of the statute to avoid; and since he has a title to pursue a sale, he must be intitled to receive the price, or remains of it.

14. On whose expence such action carried on.

IF, in the event of such action, there is any reversion of the price after payment of the debts of the deceased, the heir must thereout defray the expence of the suit. But if there is no overplus of the price, the expence must be proportioned among the creditors as they draw of the price: the heir, in such case, is only as *negotiorum gestor*, manager for them, to procure the more ready payment of their debts, so far as the price of the estate shall go; and it were unreasonable that he should be a loser in that respect^c.

^c Feb. 3. 1738. Nicolson.

15. The apparent heir's possessing on rights acquired, either in his own name, or in the name of one to whom he is likewise apparent heir, a behaviour, but probable ignorance excuses him.

FORMERLY, to obviate the fraud of apparent heirs, rights acquired by them, or confidents for their behoof, to expired apprisings or adjudications, or which became expired in their persons, were declared redeemable within 10 years after their purchase, (which must be understood after the right's becoming public by infestment or possession) for the sums truly paid for them^d; and if the acquisition was gratuitous for the sums contained in such apprisings or adjudications. But, as a farther check to such frauds, it is provided by the statute 1695, above referred to, that "where rights, or diligences affecting the predecessor's estate, are found settled in the person of such near relation, to whom the apparent heir may likewise succeed as heir, his possessing in virtue of those rights shall not only be a passive title, but likewise these rights shall only be sustained to exclude the predecessor's creditors, so far as can be instructed that money was paid for them." Before this statute apparent heirs found ma-

^d P. 1661. c. 62.

ny

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ny devices to screen themselves from the passive title of behaviour; for any singular title was sufficient, and many of them were simulate, and this gave occasion to the statute: but still if the apparent heir was in probable ignorance of the subject's having belonged to the deceased, he is safe. For example, the son possesses the estate as heir to his mother, in whose person he had probable ground to believe the right of fee subsisted, it will save him from an universal passive title, as representing his father, in whose person the fee is afterwards found to have been lodged. This may frequently happen in rights provided To husband and wife in conjunct fee and liferent ^a, where it is sometimes most doubtful which is heir.

^a July 12.
1671. Cairns.

THOSE are the principal grounds whence, by our law, behaviour as heir is inferred; but there are likewise other deeds which will subject the apparent heir to it, As one's intermeddling with his ancestor's writings, without warrant from a judge: or with his charter-chest; for that containing the whole rights of the lands, and perhaps retired bonds or discharges, the apparent heir's taking possession of it without warrant, most justly subjects him ^b. Thus likewise, if one takes payment of a bond falling to him as apparent heir; or enters to possess lands of which the deceased had a current tack, and in possession whereof he died, it is a direct behaviour; for it is owning the ancestor's right, and taking the benefit of it. The heir may seem to own a representation, by making payment of any one debt due by the deceased; but it will not subject him in a behaviour with respect to the other creditors, who thereby sustain no damage, but rather have benefit ^c, the debtor's estate being so far disburthened, and the fund of their payment thereby enlarged; and being a voluntary act, to which the heir was under no obligation to the creditor to whom he made such payment, it can raise none in favour of the rest.

^b June 20.
1670. Elies.

^c Jan. 26.
1628. commissar of Dunkeld.

It would seem, that partial payment of part of a debt due by the ancestor, cannot subject the heir to the same as to the residue; for being made either erroneously, or from some peculiar motive in favour of that creditor, he may stop short when he discovers his error, or changes his mind ^d; but I conceive he could not recover back what is paid, since the creditor got so far payment, with the party's consent, of a just debt, *Et repetitio nulla est, ab eo qui suum recepit* ^e.

^d Gilm. Jan. 16. 1665. Blacket.
^e L. 44. ff. de conduct. indeb.

THE apparent heir's proponing, and succumbing in a peremptory defence, when pursued at the instance of a creditor of the ancestor, founded upon any right or interest that was competent to the deceased, subjects him in the passive title to the pursuer; but such procedure will not fix him in a behaviour as to the other creditors, if he had no unwarrantable intromission with the deceased's writings ^f; in the same manner as was formerly observed of his not renouncing upon a charge to enter heir at the suit of one creditor, that it will have no effect in favour of the rest. Nor will his founding on a writing granted to the ancestor, in relation to the heritage, by way of proof of his allegation, make him liable to the pursuer, and much less to the other creditors on this passive title, unless he possess by virtue of such right ^g. Nor will one's objecting a defect to the pursuer's title subject him;

^f Dirlt. dec. 223.

^g Hume dec. 7.

16. Intromission with the deceased's writings, without a warrant or inventory before a judge, infers behaviour, but payment of any of his debts, will not infer it in favour of others.

17. Does payment of part of a debt subject the heir to the residue.

18. The heir's founding a defence on writings granted to the ancestor, will not subject him to other creditors.

but

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but he cannot propone prescription against the pursuer's debt, without owning the passive titles, that being a peremptory defence, and may involve the party in a proof of interruption ^a.

19. Inchoat deeds not proceeded in to effect, infers not behaviour.

IN like manner, any inchoat act of the heir, which only evidences That he intended to represent the ancestor, will not subject him, if he did not complete it: thus, his making revocation of all deeds granted by the predecessor, who died in his minority, or within his *quadriennium utile*, on the head of minority and lesion, will not infer behaviour as heir to such minor; for the revocation was useless, and is only sometimes done as preparatory to a reduction, but which may proceed without it. Nor will his taking out brieves for serving himself heir fix him in a representation; because it only shews his intention, which he may alter at pleasure, before an actual service ^b. And, for the like reason, the apparent heir's causing adjudge the predecessor's estate from himself, upon his own bond, either for his own behoof, or for the receiver's use, will not infer behaviour, unless he or the adjudger attain possession in virtue of such diligence; so that an actual intromission with the predecessor's estate, in this case, is necessary to infer against the heir a representation by behaviour. But his disposing the estate is a direct behaviour, whether he or the disponente attained possession or not, as was observed in the preceeding title.

^a Feb. 11.
1713. Lundie. June 23.
1715. Farret. Dalr. Dec.
10. 1694. Arbuthnot.

^b June 28.
1670. Eleis.

20. The husband's possession, or the tutor's, infers not behaviour against the wife or the pupil.

THE husband's possession of the estate, in which his wife is apparent heir, will not infer behaviour against the wife as heir to her predecessor, but only subject himself to the value of his intromissions ^c. Nor will behaviour be inferred against a pupil, from the tutor's doing any of those deeds, which otherwise would be sufficient if done by the party himself, unless the pupil, after his majority, take the benefit of them ^d. And for the like reason, one will not be subjected to this passive title by the intromission of a factor, in virtue of a general commission; for that will not be deemed to comprehend such actings; but if the constituent approve such intromission, it will subject him; ratihabition being equivalent to an express mandate, by the maxim, *Ratihabito mandato æquiparatur* ^e.

^c Fount. Jan. 15. 1680. Dingwal. Decem. 17. 1703. Hume.

^d Nov. 30. 1665. Boyd.

^e L. 60. ff. de reg. juris.

21. How far the heir's ratifying a death-bed disposition infers behaviour.

THE apparent heir's ratification of a death-bed deed, alienating the estate, will not infer behaviour against him, even tho' he get a valuable consideration for doing it ^f; because the reduction of such deed, on the head of death-bed, is a peculiar privilege of the heir, which he may use or not, as he pleases, in the same manner as he might abstain from representing the deceased, even tho' no such disposition had been granted; but the creditors may reduce the deed on the act 1621, or any other ground competent to them as creditors, and so affect the subject, as accords of the law.

^f Arg. July 19. 1676. Nevay.

22. Behaviour, unless established by sentence, or litiscontestation against the behavior, not transmissible against his heir.

THE effect of behaviour as heir is, that it subjects the behavior to all the debts of the deceased; but if it is not established against him in his own time, his heir will not be thereby liable to the passive title; for these disorderly immixtions with the ancestor's inheritance, *sapiunt naturam delicti*, have the resemblance of a delinquency, and partake somewhat of the nature of it, and are evidently penal, and so cannot pass upon heirs, unless, at least, litiscontestation had been made

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made against the behaver in his own life, as in the case of delicts; which also holds in vicious intromission. But, at the same time, as other penal actions, both are good against the representatives, to the extent of the deceased's intermeddling.

It would seem plain, that behaviour as heir can put one in no worse case, with respect to his relief, than an actual service; and therefore, if one is pursued on this passive title, who is only liable after discussing other heirs, he may propone that defence; or if he omits it, he cannot be obliged to pay without an assignment, for his relief against the heirs primarily liable, or executors.

23. The behaver has such relief against the other representatives, as if he were served.

HEIRS-portioners, all behaving, are liable to the debts, in the same manner as if they were served: but if the estate is provided to one of them, the only is apparent heir therein, and so only liable to this passive title of behaviour as heir. But the rest may behave by intromission with heirship moveable, in which case they may be subjected in payment, and are liable to relieve each other according to the emolument of the succession devolving on them^a, or intermeddled with.

24. The case of heirs-portioners as to this passive title.

^a Feb. 15.
1634. Orr.

In most cases concerning behaviour as heir, the *animus*, or design of the party, is chiefly to be regarded, as above. Hence, if the apparent heir has intromission for preservation of the things only, it will not be inferred; or if he dispose of things that should otherwise perish, and it appear he did it only with that view, he will not be subjected to this passive title^b; or if he do an act of humanity, it will not be effectual to subject him, as by taking care of burying the deceased; tho' by the civil law in such cases, the *fui hæredes*, or children unforisfamiliarized, behoved to protest that they did those acts, not as heirs, but on the above account^c. The heir's using the title of honour that belonged to the ancestor, will not infer behaviour; because it is only in virtue of the patent whereby the title is conferred, not only upon the receiver, but likewise is a grant to his heirs, without regard to their representing him, that he enjoys it. Nor is a title of honour a thing in commerce, and the heir's using it does no prejudice to the creditors^d, as I had occasion to observe in another place^e.

25. The heir's necessary intromission for preservation, or his performing acts of humanity, or using the deceased's title of honour, infer not behaviour.

^b Arg. P.
1695. c. 24.

^c L. 20. § 1.
ff. de acqu.
vel. omit.
hæred.

^d Harcus
(heirs) Feb.
2. 1682.
Bonar.

^e B. 1. tit. 2.

As to the question, how far an heir's founding upon the deceased's titles, to qualify himself for voting in the election of a member of parliament, will infer behaviour, it would seem certain that it will; since he cannot get himself inrolled among the electors, without making use of the ancestor's writings for that purpose, and it is a privilege competent only to him as heir to his predecessor.

26. The heir's founding upon his predecessor's rights, as a qualification to vote in the election of a member of parliament, infers behaviour.

Observations on the Law of England, in relation to the Premises.

BY the law of England, there can be no place for this remedy; because the heir, by taking possession of the lands and tenements of the ancestor, is thereby vest and seised therein, that being an entry thereto. The heir's taking possession of the heir-looms (as heirship-moveable may be called) can have no other effect than to subject him to the value^a. And an heir being only liable according to the assets or heritable subjects descending to him, there can be no place

1. No place for this passive title in the law of England.

^a Coke 1.
inst. 18.

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for any penal passive title; the intent of which only is to hold the heir, by his turtious deeds, in the same case as if he was entered.

T I T. VII.

Lucrative Successor.

1. The passive title of lucrative successor.

FOR the benefit of creditors, this passive title (as all the rest) is introduced against one that is a Presumptive heir, *Alioqui successurus*, that his accepting a gratuitous right from the ancestor to his estate, or part of it, subjects him to all the predecessor's creditors, whose debts were contracted before granting the right: hence he is termed Lucrative Successor, or *Successor titulo lucrativo post contractum debitum*; and he is said to be heir *Præceptione hæreditatis, i. e.* by enjoying the inheritance, or part of it before-hand, or before his predecessor's death, which puts him in the same case with respect to prior creditors, as if he had succeeded to it after his father's death. But strangers, acquiring gratuitously parts of the debtor's estate, are only liable *in valorem* to the granter's creditors, by the act 1621, if he was then insolvent. The law presumes, that one who is *alioqui successurus, i. e.* presumptive heir, by necessary course of nature, taking a gratuitous right to the whole, or part of the estate, does it with an honest and fair design, to represent the granter as to all his prior creditors; and therefore, as to them, makes it a passive title after the granter's death.

2. The gratuitous right likewise reducible on the act 1621, and this is the only remedy in the granter's life.

THE gratuitous right is likewise reducible on the act 1621, if the granter became thereby insolvent; and this is the only remedy the creditors have while the granter is in life, whether against strangers, or the presumptive heir; for it were absurd to pursue one upon the passive *Titles*, as representing a person still in life, *Viventis nulla hæreditas*. Wherefore, tho' the acceptance of such right founds the passive title, yet it cannot be effectual till the granter's death, from the nature of the thing.

3. What if the right is taken originally in the name of the eldest son.

IF one take a right originally in his eldest son's favour, this passive title cannot be competent, for the son cannot be successor to his father in the right which was never in him. But the prior creditors may insist in a declarator, on the act 1621, that the right was purchased by the father's money, and in fraud of them; and, if the disponent was then an infant, or under age, the presumption is, that it was so acquired, and will burthen the disponent to instruct the contrary, *viz.* that it was purchased with his own money, left to him, perhaps, by a friend, and committed to his father's management.

4. The disponent's being *alioqui successurus*, how understood, and if daughters are esteemed such.

THE person to whom the gratuitous rights are granted must be, *Alioqui successurus*, necessarily intitled to succeed, by the course of law; and therefore one's eldest son is always vested with this character. But a brother, or other collateral, is never esteemed, on this passive title, *Alioqui successurus*, or a person that would otherwise inherit, tho' the granter had no children at the time; because still he might have them; nor is one presumed fraudulently to alienate in favour of collaterals^a. The eldest grandson, by the eldest son, is subject

^a Decem. 22. 1674. Seton.

subject to this passive title, by accepting gratuitous rights; because, by the course of succession, he is to inherit, tho' not immediately, (his father being in life) and there is the same reason for sustaining it against such grandchild, as against his father; and indeed both are liable, if the one gets the liferent, and the other the fee^a. It may be doubted, if such rights made to daughters, by one who has no sons, will subject them as lucrative successors; and tho' it may seem, that they cannot be liable in this passive title, because one may still have sons, yet, if the granter die without sons, the daughters, accepting such disposition, will be liable *præceptione*; for it is presumed, that the father, at making of the settlement, resolved to be represented by such daughter. And this is consonant to precedents^b, whereby one of more daughters, in such case, was subjected by the court of session to the whole debt upon this passive title, she having accepted a right to the whole estate.

^a Feb. 23.
1634. Lighton.

^b Feb. 15.
1624. Orr.

THIS passive title is only introduced in favour of creditors, prior to the disposition or obligation to dispoise the property; for, if they are posterior to such obligation, tho' prior to the disposition and infestment, which is only a completing the title, they cannot have benefit thereby^c. And truly an inhibition, in that case, would not be effectual, unless used prior to the obligation to dispoise. If the debt is contracted after the disposition, or obligation to dispoise, tho' prior to the seisin, it will not regularly subject the dispoinee on this passive title^d; but sometimes it will, as after-mentioned.

^c July 23.
1678. Ferguson.

^d Feb. 23.
1637. Lighton.

THE deed that infers this representation must, from the very nature of it, be Lucrative; nor, in such case, will a prior provision of a land-estate, in favour of the heir of the marriage, support the deed, granted to him in implement of it, from falling under that character; for he is *alioqui successurus*, as heir of provision in the subject after disposed^e. But, if there was a determinate time for infesting the eldest son of the marriage in the fee of the estate, the subsequent infestment, in performance of such obligation, would not infer this passive title^f.

^e Nov. 29.
1678. Higgens. Nov. 21. 1705. Gillespie.
^f D. decif. Higgens.

Arg. July 22.
1724. Douglas. Hume decif. 51.
^g Dirl. decif. 130. id. decif. 377.

IF the right is partly onerous, and partly gratuitous, the court frequently subjects the receiver only *in valorem*, viz. so far as it is gratuitous^g. But the recital, in this case, being between conjunct persons, will not instruct the onerous cause. The undertaking bonds of provision to the younger children, delivered after contracting the creditors debts, will not be a sufficient instruction of onerosity; because the creditors are preferable to the children. But, if payment was made, *bona fide*, to the children, of these provisions, before the dispoinee was interpellated by the creditors suit, it will defend him, reserving to the creditors their recovering the same from the children, as they best can.

5. The deeds must be prior to the disposition, or even obligation to dispoise.

6. How far dispositions granted to heirs of provision, in implement of their provisions, infer this passive title.

7. What if the right is partly onerous, and partly gratuitous, or if the subject disposed was provided to other heirs than the dispoinee.

A GRATUITOUS right of any heritable subject, to which the receiver would have necessarily succeeded, infers the passive title, as above: whence it follows, that a right to a subject provided to heirs-male, or of tailie, granted to the heir of line, perhaps a daughter, will not infer it, for she is not *alioqui successura* in the same.

By

8. Such successor hath relief against the executor as to moveable debts.

By intendment of law, a successor *titulo lucrativo* is liable to the prior debts, in the same manner as he would, if he had entered heir in the subject, as above. Hence, tho' such right, made to the heir of line, will subject him to the creditors, yet he is intitled to his relief, against the executors, as to moveable debts.

9. This passive title transmissible against the heir of the lucrative successor, because not deemed penal.

THE passive title of Behaviour, unless constituted against the behaver, or at least litiscontested with him, will not affect his heir beyond the value; because it is truly penal, as I formerly observed. But this of lucrative successor is not properly penal: for the heir is presumed to know the condition of the estate, before he accepts a right to any part of it, and so it is frequently beneficial; and, being *Præceptio hæreditatis*, giving an active, as well as inferring a passive title, it passes against heirs, tho' not constituted by decree or litiscontestation, against the deceased receiver of the right, in the same manner, as if the receiver had been heir served^a. And, for the same reason, if the disponent die before the disponent, the heir that makes up a title to the disposition, and so possesses the estate, is liable to the disponent's debts *præceptione*^b. It is upon the same principle, that a tutor's accepting of a disposition, in behalf of the pupil, will subject the pupil; for, if the pupil is leased, he may, at his majority, free himself, by renouncing the deed, and likewise sue the tutor for damages incurred in the mean time, by so involving him.

^a Hume decif. 59.

^b Dalr. Jan. 24. 1717. Henderson.

10. If the disposition is kept latent, how far the creditors, contracting after it, intitled to the benefit of the passive title.

THO' it hath been above observed, on this passive title, that the debts to which it subjects one must be prior to the disposition, or obligation to disponent the estate, and that it is not sufficient they be prior to the infestment in the person of the disponent; yet, as the case is between most conjunct persons, therefore, unless the disponent is infest, or in possession of the subjects, the creditors contracting, after the date of the latent disposition, will be in safety; for otherwise none could be secure against frauds, by such personal deeds, perhaps kept latent of purpose to ensnare creditors. In this sense only I can take our lawiers, in laying it down as a rule, That this passive title secures only creditors whose debts are prior to the granting of the disposition, but not such as are after the disposition, tho' prior to the infestment thereon^c; and to judge otherwise were to unsecure our records, and make way for committing of frauds.

^c Stair hic §6. Mackenzie, b. 3. tit. 8. p. 179.

Observations on the Law of England, in relation to the Premises.

1. This does not obtain in the law of England; hæres Astrarius, who.

THE foregoing passive title does not obtain in the law of England, so far as I can find. Indeed, in the old English law-books, there is mention made of *hæres Astrarius*, from *astre*, the hearth of a house. This takes place, where the ancestor, by conveyance, sets the heir apparent and his family in a house or living, in his own lifetime, which the party was understood to hold as heir^a. But, tho' old Bracton mentions such kind of heir in his time, yet, from lord Coke, it would seem, that the same had gone into disuse, for he speaks of it as a matter of antiquity^b. This, in some measure, resembled our case; we call it sometimes *Præceptio hæreditatis*, for it is as an anticipation of the succession, with respect to the lands so conveyed.

^a Bract. lib. 2. c. 85.

^b Coke 1. inst. 8.

T I T. VIII.

Executors.

SECTION I. *Testaments, Dead's Part, the Wife's Share, and Legitim.*

ALL the moveables one has at his death, (except the heirship-moveable, allowed to the heir for setting up his family) are called Executory; because they are stated in the person of another, by executing the testament of the deceased, either testamentary or dative. He to whom the office is committed by the deceased, or by the law, is called Executor, because it is his business to execute the testament. This implies both an office and succession; but the succession is often Fiduciary, in a great measure: for an executor, unless he has a proper interest in the subject, is bound to account to them who have, for the contents of the inventory, in manner after mentioned, and is liable to diligence. Succession therefore in moveables is either testamentary, by the will of the deceased; or from the intestate, by the provision of law. In the first, the executors execute the will of the deceased, and in the second the will of the law. And even, by our ancient usage, the next of kin to the deceased, in default of his nomination, in the same manner, as at this day, were executors to him^a. Executors nominate can only be appointed in a testament, and the nomination of executors properly constitutes the Testament, they being heirs in moveables; and, in a proper sense, a testament is, by the civil law, "the nomination of heirs," which extended to all one's estate, heritable or moveable: but with us can only be as to moveables.

1. Succession in moveables, either by the will of the deceased, or the will of the law; the first of executors testamentary, and the other of executors dative.

^a Reg. maj. lib. 2. c. 38.

A TESTAMENT is likewise termed a *Last-will*, because the last-will of the deceased always prevails, testaments being ambulatory or revocable till the last moment of life. With us it is "one's will, appointing successors in his moveable effects, after his own death." It has a common stile. But any words capable to shew the deceased's mind are sufficient, provided executors be thereby appointed. It must be in writing, with the ordinary solemnities of other writings; except that one notary, or the parish-minister in place of a notary, if the party cannot write, is sufficient to subscribe for him, with two witnesses, in matters of the greatest importance as to moveables^b; for heritable subjects cannot be disposed in testament, that being altogether incompetent, tho' made in perfect health. Legacies in writing require the same solemnities with testaments. We have the term Executors from the canon law, which requires only two witnesses to testaments^c, whereas, by the civil law, seven were necessary^d; but, in the interpretation of wills and legacies, we follow, for the most part, the civil law.

2. A testament; one minister or notary sufficient to subscribe for the testator.

^b P. 1584. c. 133.

^c Cap. 17. ext. de test.
^d Tit. inst. de testam.

If an executor refuse to deliver back the testament to the testator, he forfeits his interest therein to the executor at law; or, if a legatary do it, he forfeits his interest to the executor nominate^e, on a presumption, that the party who used the testator so was conscious, that the testament was to be altered, as to his interest. And, for the same reason, if one compelled the testator to make the testament, or

3. If the executor or legatary refuse to deliver back to the testator the testament, he loses his interest therein.

^e Dalr. Nov. 4. 1704. Buchanan.

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to alter the testament, already made in behalf of others, in his favour, he loses the benefit he was so unwarrantably grasping at, but the testament subsists as to all other persons interests, who were not necessary, after the prescription of the civil law^a.

^a L. 2. ff.
si quis aliq.
testari, &c.

4. The interest of an executor nominate of old, the whole dead's part, by an erroneous custom; but, by the statute 1617, is restricted to a third.

AN executor nominate has the office of executing the testament, and is preferable to all others therein; and of old, he had the whole free dead's part to himself, after payment of the debts and legacies; but that was remedied by statute, so that he has now only the third of dead's part, or of that which the deceased had power to dispose of by testament, and is accountable for all the rest to those interested in the executory^b. But in this third any legacy he gets from the deceased is computed. If the executors are not strangers, but have otherwise an interest in the executory, as being the deceased's wife or nearest of kin, they get no reward by the office^c; the third being only given for an encouragement to strangers to execute the testament, but others to whom a share of the executory belongs, are sufficiently incited from their own interest.

^b P. 1617.
c. 14.

^c Nov. 28.
1676. Ker.
Jan. 15.
1674. Paton.
Jan. 25.
1681. Arnot.

5. Nuncupative testaments or legacies not good beyond 100 l. nor as to nomination of executors.

NUNCUPATIVE testaments, or testaments made by Word of mouth, without writing, were in use with the Romans, and are sustained in several countries. However, we do not regard them as to a nomination of executors; but a legacy left by word is good, and may be proved by witnesses, within 100 l. Scots, but no farther. And, tho' such testament was made abroad, according to the custom of the place, we would not otherwise sustain it^d; because the laws of foreign countries can never constitute a right of succession, which must have its force from the laws of the place where the subject lies: and the maxim, *Mobilia sequuntur personam*, is not to be understood of one's effects, without the jurisdiction where the person resides.

^d Jan. 19.
1665. Schaw.

6. Not good for a greater sum, tho' offered to be proved by the defender's oath.

THO' it were offered to be proved by the nearest of kin's oath, that the deceased left a legacy to an extent beyond 100 l. it would seem not to be good for a greater sum; because it is an essential solemnity, that testaments and legacies, exceeding that sum, should be in writing. So that it is not the proof only by witnesses that is rejected in our law, as to such legacies or testaments, but writing is required as a solemnity to them; in the same manner, as a formal interrogation and answer was necessary to a verbal obligation or stipulation with the Romans; and as writing is essential to certain other deeds with us.

7. Legacies in a null written testament not good for 100 l. as nuncupative.

WHERE a testament in writing, which contains legacies, was reduced upon informalities, it was pleaded for the legatees, that the same should be sustained, to the amount of 100 l. to each, as verbal bequests, but their claim was rejected^e: for the testament being void, it could have no effect, and the testator intended only, that the legacies should be founded on the testament, *Et quod potuit, non voluit*, he might have left them by word, but did not will it.

^e July 20.
1711. Moncrief.

8. Who intitled to make testaments, and who not.

ALL persons may make a testament who are past the years of puberty, and have the use of reason. Thus wives and minors, without consent of their husbands or curators, persons interdicted, without

out

^a Lib. 1. tit. 2.
§ 6. Sup.
tit. 3.

out their interdictors, may make a testament. But, as I have observed elsewhere ^a, bastards, unless they have lawful issue, or *testamenti factionem*, i. e. a power of making a testament, by the king's letters of legitimation, cannot dispose of their effects by latter-will, in prejudice of the king to whom the escheat of bastardy belongs.

THE subject of testaments is moveables of all kinds, viz. not only the species of goods, as household-furniture, lying money, implements of husbandry, cattle, &c. but likewise *nomina*, or obligations and debts due to the testator of a moveable nature, whether bearing interest or not. But rights concerning heritable subjects, as lands, &c. and likewise those that are such, by a clause secluding executors, do not fall under the executory, or a testamentary power; and indeed it was the trouble and expence of making up titles to such bonds by confirmation, that introduced them into practice, tho', by that means, younger children are frequently left destitute.

9. Only moveable subjects disposable by testaments.

^b 9 Annæ,
c. 20.

THE stock of trading companies, erected into corporations, is for most part declared, by the statutes or charters of erection, to fall to executors, and not to the heir ^b. But without any provision to that purpose, such stock would be moveable, since it bears none of the characteristics of an heritable subject, and so the court of session has adjudged in repeated instances ^c.

10. The stock of trading companies goes to executors.

^c July 25.
1711. Murray. Hume (heritable and moveable) p. 368.
July 1. 1734. Dalrymple.

IF one has a wife, and children unforisfamiliaried, he cannot dispose by testament, or on death-bed, any more than his free proportion of the moveables, termed Dead's Part, viz. the dead man's part; but cannot incroach on the wife's legal share in the communion of goods, called her *Jus relictæ*, or the childrens share, termed their Portion-Natural, Legittim, or Bairn's Part of Gear ^d. I have elsewhere observed ^e, what share falls to the wife, or her executors; namely, the third, if there are children in family, and the half, in case there are none, from which she is not excluded by a conventional provision, unless it bear "in satisfaction thereof." But she draws only a proportion of such goods or effects as fall under the communion of goods between man and wife, and so she is excluded from all heritable subjects, and bonds bearing interest at the dissolution of the marriage, and heirship-moveable.

11. The dead's, or dead man's part; the wife's legal share.

^d Hume decif. 107. Dec. 12.
1712. Mac-Aulay.
^e B. 1. tit. 5. §. 109.

THE rule, as to sums bearing interest, without a clause of infestment, or secluding executors, whether the same shall be exclusive of the *jus mariti* and *jus relictæ*, as being heritable, is, That the same, after the term of payment of the principal sums, shall be deemed heritable in the above respect, provided they bear interest after the said term, as being then taken to be stocked out, and a *feudum pecuniæ*; but their bearing interest from the date of the bonds, till the term of payment, without saying farther as to interest, does not make them heritable as to the above effect ^f. As this was the rule of old, so it still continues; for, tho' the statute 1661, which declares bonds, with clauses for interest, to be moveable as to the nearest of kin, but heritable as to the relict and fisk, seems to import, that the bearing interest from the date will make them heritable from that period; yet the act of the rescinded parliament 1641, to which tacit reference is made

12. The rule as to bonds bearing interest, their falling under the *jus mariti* or *jus relictæ*.

^f Decem. 7.
1627. Porteous. Feb. 26. 1629. Douglas.

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made in the statute 1661, expressly mentions the term of payment, and the above quoted decisions clear that to have been the former practice, and which the court of session have lately settled^a; and in this sense, what I have said in general elsewhere, on the same head, must be taken^b.

^a Falc. Nov. 22. 1748. Craig.
^b B. 1. tit. 5. § 83.

13. How heritable bonds may be made moveable, and return again to be heritable.

BUT such bonds as become heritable, after the term of payment, and even bonds heritable by infeftment, may be made simply moveable, so as to fall under the communion of goods, and to increase the wife's share by a charge of horning, or by using requisition, where that is necessary by the conception of the bond^c; but, if that is past from, either expressly; or tacitly, as by suffering the charge to expire, in not denouncing thereon, and registering it within year and day, so that the effect of it ceases; or by receiving interest for terms that fall due after the requisition or charge, they return to the same condition as before, and become heritable^d. Thus likewise, if the heritable bond has a clause, declaring, "That notwithstanding requisition or charge, the security shall not be loos'd," it remains still heritable, after those are used; or, if it bear a proviso, secluding executors, or the equivalent^e, a charge will not alter its nature. All this is founded on the intention of the creditor, followed out in a legal way, and the incompatibility that a debt should be both heritable and moveable at the same time. It may be doubted, if the creditor's assigning the bond, after requisition or charge, will alter the case in a question between the heir and executor of the assignee; and I should think it will not, because the bond is assigned, such as it was at the time, and the conveyance of a right cannot vary the nature of it; for, tho' the intention of the cedent cannot be transmitted to the assignee, yet since, pursuant to such intention, the bond was rendered moveable, it must remain so; unless it is altered by the terms of the assignment, or the assignee had done some such legal act, as aforesaid, to return it to the original state. I shall add no further to what I have discoursed at large, upon rights heritable and moveable, in another place^f.

^c March 10. 1630. Lindsay. June 25. 1672. Setons.

^d Spotf. (assignments) Donaldson, p. 18.

^e July 24. 1705. Gray.

^f B. 2. tit. 1. sect. 4.

14. Right of relief, tho' as to an heritable bond, simply moveable.

IF the husband, as cautioner in an heritable bond, pays it, and takes a discharge and renunciation, the right of relief, competent to him, is simply moveable, and falls under the communion of goods between man and wife; because, by the discharge, the original debt is extinct, and the claim of relief only arises from equity to the person who pays another's debt, which is the same, whatever was the nature of the debt paid^g, as I observed formerly in the case of such claim of relief, that it was simply moveable^h.

^g Jan. 1736. Wilkison contra Balfour. Dury. July 10. 1629. Wardlaw, and the other cases there quoted.
^h Sup. tit. 4. § 8.

15. The legitim; it cannot be prejudiced or affected by death-bed deeds.

THE legitim or portion natural, is "The share which the lawful children, unforisfamiliated, have in their father's succession of moveables." If there is a land-estate to which the heir succeeds, he is barred from the legitim, unless he collate it, as after mentioned. It is the third in the division with the widow, and the half as to subjects that fall not under that division; and if there is no relict, or if the widow has accepted a provision in satisfaction of her interest in the executory, it is the half of the whole; and the other third or half is the dead's part. If any of the children were forisfamiliated, the whole legitim belongs to the rest; and, if all the younger children have renounced their

^a Feb. 25.
1747. Mar-
shal.

^b July 13.
1681. Chris-
tie.

^c Reg. maj.
lib. 2. c. 37.

their interest in the executory, it will wholly accrue to the heir ^a, in the same manner as in a question with the wife, or her next of kin, when he is the only child. The childrens share is only after deducting all moveable debts owing by the deceased; and likewise the heirship-moveable, if there is any due to the heir. The childrens right to the legitim is so strongly founded, that no appointment of the father's can affect it; so that, tho' they are pupils, he cannot substitute any to them, in case of their dying in pupillarity, pupillar substitution, which took place with the Romans, being unknown in our law ^b; but all his effectual deeds in *liege poustie*, viz. while in health, diminish, or burthen the subject of it. This division of moveables of a person deceased, into the bairns part or legitim, the wife's share, and the dead's part (which last only one has the free disposal of on death-bed) is of ancient standing with us ^c. Wherefore, one cannot prejudice his wife or children by gratuitous deeds on death-bed, or by testament, of their legal shares of his effects; because, on death-bed, he may easily be importuned to unreasonable deeds: and, a testament not divesting the testator, his moveables must be subject to those claims; and thus the will of the law prevails over the will of the party.

BUT the forisfamiliation of a child bars him from the legitim. A child is said to be forisfamiliated, when he receives payment or satisfaction of his portion natural, discharges the same, or accepts a bond of provision in satisfaction thereof; but, if it bear not to be In satisfaction, he may still claim his proportion of the legitim, upon collating his bond or portion to the other children. And, if there are no other children, tho' there be a widow, he will be intitled to the whole portion natural, without collation; which is only introduced to make equality among the children themselves; but takes no place in a question with the wife, as to her share, to which collation is not made ^d, there being no reason that the same should be enlarged by such means.

16. Forisfamiliation and collation; no collation to the widow.

^d Jan. 16.
1678. Mur-
rays. Jan. 12.
1681. Trot-
ter.

A TOCHER, dowry, or other provision to a child, must be collated to the other children, upon his or her claiming a share of the legitim; but, if it is specially provided, "that the child shall be a *bairn in the house*," as it is express in our stile, i. e. shall be considered as still unprovided, and have an equal interest in the father's moveables with his other children, then collation ceases. Thus, such bond of provision or portion is a *præcipuum* to that child ^e, that being the express ordinance of the father, by such proviso, who may burthen or exhaust his whole executory by effectual deeds in *liege poustie*.

17. Collation not due, if it is provided, that the child shall be a bairn in the house.

^e Feb. 8.
1622. Finlay-
son.

It may be doubted, how far provisions of sums of money, in a contract of marriage to children of the marriage, are liable to collation. In the first place, 'tis plain, that if they do not bear, "That the same shall be in satisfaction of their legitim," they cannot, by such provisions, be excluded from the same. And next, that they being creditors therein, may affect both the heir and executors of their father for payment. But the great question is, If they can take both the provisions and their share of the legitim? and, I conceive, that such provisions to children *nascituri* are, in the same case, as bonds

18. How far provisions to children nascituri liable to collation.

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of provision to children already born, so that they cannot take both. Thus, if a man in his first marriage-articles makes provisions to the children that shall be born of that marriage, and enters into a second marriage without any contract, the children of the first marriage must collate their provisions, if they claim a share of the executory with the children of the second marriage; or, if the father makes an assignment of his executory, perhaps to his eldest son, the younger children cannot pretend to claim such provisions, and likewise a share, as their legitim, over and above^a. This is conform to the decision of the civil law, which subjects to collation, whatever any of the children receive in name of provision from their father^b. And, in this sense, what I have observed in general elsewhere, upon this point, must be understood^c.

^aHume decis.
67. Jan. 18.
1727. Nis-
bets, varied
on appeal.
^bL. 29. c. de
inoff. testam.
^cB. 1. tit. 6.
§ 6. in fin.

19. No colla-
tion of lands;
the only
younger
child re-
nouncing the
legitim, in-
titled to the
whole execu-
tory.

IF one of the children got a provision in land, not bearing in satisfaction of his portion natural, he is not bound to collate the same; for there is no collation of heritable subjects, except when the heir claims to be admitted as executor; nor does collation take place as to the dead's part. Thus one may have got a bond of provision in satisfaction of the portion natural, and yet may, as one of the nearest of kin, claim his share of the dead's part, without collating the bond. And if he is the only younger child, he will be intitled to the whole executory, notwithstanding his renunciation of the legitim, and the heir will draw no share of it; because the heir can claim none of the executory while there is another nearest of kin in the same degree, and the child who renounces the legitim remains still next of kin, and, as such, takes the whole executory^d.

^dFeb. 22.
1749. Mar-
tin.

20. The ef-
fect of one
or all the
childrens re-
nouncing
their whole
interest in the
executory.

BUT if one has accepted a bond "In satisfaction of all he can claim by his father's death," he is excluded from the whole executory which accrues to the rest; and if all the children have so renounced, they will, notwithstanding such renunciation, be intitled to the dead's part, as nearest of kin, considered without respect to the legitim, which, in that case, can take no place; for the renunciation being in favour of the father and his executors, if there is none in the same degree of relation but themselves, the right by law devolves on them as his nearest of kin: however, in that case they cannot claim a bairn's part in prejudice of the relict; because, having renounced, they were thereby forisfamiliarized^e. But if the heir is in the same degree with the younger children that renounced their interest in the executory, the heir, who is then considered as the only nearest of kin, will get the whole^f.

^eJan. 27.
1680. Sandi-
lands.

^fFount. Dec.
4. 1694.
Fowbister.

21. A child
that renounc-
es, or his is-
sue, has no
claim to a
share of the
executory, if
there are o-
ther children,
or their issue;
what if such
child die be-
fore his pa-
rent, and
leave issue.

IT is to be observed, that, as where there are other children, the executory descends wholly to them, and not to him that renounced all interest therein; so, if the other children are dead, leaving issue lawful, the executory belongs to them, and none of it to the renouncer, who is only intitled, failing other descendants of the deceased^g, nor will the renouncer be admitted, upon offering to collate. And as the renouncer is excluded; so, if he should die after the executory devolves by the father's death, and the question came between his children, and those of the rest likewise deceased, the last would be preferred, since they would have excluded the renouncer himself;

^gHume (near-
est of kin)
Feb. 2. 1731.
Campbell.
July 21.
1738. Camp-
bell.

himself; and the right being discharged, his children, who could only claim in his right, are barred. It would be otherwise if he predeceased his father, for then his children would take in their own right proportionably with their cousin-germans *secundum capita*, according to their number, as nearest of kin to the deceased, and not in their father's place, there being no representation in moveables.

COLLATION, however, only takes place among children unforis-familiated, who have right to a legitim or bairn's part, in order to make an equality among them in that respect; and consequently it cannot obtain among grandchildren, who have no title to a legitim, as shall be presently observed.

22. Collation takes no place among grand-children.

SUCH renunciation, even in a child's contract of marriage, upon his receiving a portion, was not effectual by the civil law, which did not sustain any pactions touching succession; so that, notwithstanding thereof, the child might, upon collating the portion, take a legal share with the other children in the succession to their parents^a; but, by the canon law, such renunciation was good if confirmed by an oath^b. There is no doubt we have this doctrine, touching one's renunciation of his succession in moveables, derived to us from that law, tho' there is no necessity, by our practice, that the renunciation be made upon oath; but collation hath obtained with us from the civil law, as above.

23. The renunciation of the legitim is derived from the canon law.

^a L. 3. c. de collat.

^b Cap. de pact. in 6to.

GRANDCHILDREN have no title to a legitim, tho' their parent who predeceases had not obtained a provision in full of the legitim, or otherwise renounced it; since the bairns part of gear, as the legitim is vulgarly called, takes place with us only in favour of the immediate children, but not of grandchildren. Our law would seem thus to suppose, that by marriage the children were forisfamiliated, which however is not the case; for the children themselves, even after marriage, are intitled to the legitim, if they have not renounced it. Our law, in this respect, I apprehend, is thus founded. Generally parents, upon the marriage of their children, give them such advancement or provisions, as they intend, out of their estates. This is often done without writing, and may be proved by the childrens oaths while they are alive. But that mean of proof ceasing by their death, the law cuts off the claim of legitim, that the father's executors may not be in hazard of being subjected to a claim already satisfied, and this presumption our law makes *juris et de jure*, viz. such as cannot be controlled or traversed^c.

24. Grand-children have no title to a share of the legitim, even tho' their predeceased father got no portion natural.

^c L. 20. ff. de legibus.

THO' the father grant a general disposition to his heir, or any other person, of all his moveables, with a power of revocation, and the burthen of certain provisions to his younger children, in satisfaction of their legitim, yet they will not be excluded from their share of the same, unless they accept these provisions^d; because the legitim is the childrens share of their father's effects, of which he stands possessor at his death; now he is still proprietor, notwithstanding such disposition, which only takes effect after his death, revocable by him the granter. The same rule must hold as to the wife's share of the goods in communion, that such general disposition cannot prejudice her;

25. The legitim, or wife's share in the executory, not affectable by revocable deeds in *liege poustie*, but may be excluded by a provision in one's contract of marriage.

^d Hume de- cif. last, Henderson.

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her; for, the effects still remaining the property of the husband, she must have her share of the same, as if no such disposition had been granted, her right being rather more strongly founded than the childrens legitim. But if one, in his contract of marriage, provides all his moveables, that he shall have at his death, to the heir of the marriage, with certain provisions to the wife and younger children; such settlement will exclude both wife and children from their respective legal claims, there being no possible suspicion that there was any fraud intended against them, and the marriage articles must be observed, and all effectual obligations, executed *bona fide*, are good against those claims.

26. Can one, by a gratuitous deed irrevocably conveying all his effects in *liege poustie*, prejudice the legitim, or the wife's share.

BUT there may be a doubt, where one, by any other deed than his contract of marriage which settles the claims of his wife and children, effectually conveys his whole moveables, and delivers such irrevocable deed in *liege poustie*, if the same will prejudice the wife and children? For answer, If the deed is gratuitous, it would seem that the same cannot be effectual against the wife; for it would be presumed to have been made in defraud of her; and if he retained still the possession, the property was in him at his death, and so the wife's share in the division would take place. But as to the childrens legitim, I conceive it would bar them, since they can only claim the same, with the burthen of all the deeds of their father affecting his moveables, executed in *liege poustie*; for, if the deed is effectual against the father himself, it must likewise be so against the children, who can only claim in his right.

27. The legitim with us derived from the civil law, but differs much from the same as there settled; those variations.

BY the prescription of the civil law, the legitim, or legal share due to the children, of their parents estates, was the third of the whole, in case of four children or fewer, and, if more, the one half was their portion of the same: it obtained as to both parents; and if the children predeceased, leaving issue, such issue, by the right of representation, had the same legitim in their grandfather's estate, heritable or moveable. If the children died without issue, living their parents, they had a legal share likewise in their childrens estate, which was the fourth part thereof, and was the antient standard of the legitim in every case. If the parents or children made a will in prejudice of the legitim, it was set aside, so far as the same was encroached upon, by an action or complaint, called *Querela inofficiosi testamenti*^a, as being inconsistent with the duty of a parent or child. And after the same example, if a parent or child, in such case, exhausted their estate, by profuse and exorbitant gifts, the like remedy was competent to have the same retrenched^b. But tho' the legitim with us be originally derived from the civil law, yet it varies considerably from the above principles; for, first, it only obtains in respect to moveables; this no doubt was owing to the feudal usage, for the continuance of land-estates in families. Again, it only takes place in favour of one's immediate children, but not of their issue, and much less in favour of parents. Next, there is no legitim due from the mother, who may freely dispose of all her effects. And lastly, tho' a father cannot by his testament, or any testamentary deed, prejudice his children of their legitim, yet he may exhaust all his estate by exorbitant gifts, executed in his life by irrevocable deeds,

^a Tit. inst. et cod. de inoffic. testam. novel. 18. c. 1.
^b Tit. cod. de inoff. donat.

^a Lib. 3. tit. 29. c. de inoff. donat.

as above; for we have not received the title in the civil law *de inofficiosis donationibus*^a, by which a remedy was given to children and parents against such profusion, as strongly as against undutiful testamentary settlements.

^b July 16. 1678. Murray. July 23. 1678. idem.

WHERE the eldest son succeeds as heir, he cannot claim any interest in the executory, either as a share of dead's part or legitim; because, in such case, the succession divides, and the heritage goes to the eldest son with the burthen of the heritable debts, and the executory to the younger children with the burthen of the moveable. But as the eldest son is still one of the nearest of kin with his brothers and sisters, he may claim, in that character, a share of the whole executory with them, upon collation or contribution of the heritage, both what he succeeds to after his father's death, and what he got disposed to him before *præceptione hereditatis*, so as the whole subjects of the succession may be equally divided among them all^b; and which holds in all cases where the heir is in the same degree of relation with the executors; but otherwise he cannot be admitted, even tho' he were willing to collate, since he is not vested with the character of Nearest of kin, and so cannot claim as such.

28. The heir intitled to no share of the executory, unless he collate the heritage.

^c Jan. 12. 1681. Trotter. Hume decif. 67. Dec. 1720. lady Balmain, note at the foot.

THE widow is not bound in a question about her legal share, to collate any gratuity she gets from her husband, whether by a bond for love and favour, or by way of legacy; for, as to a bond, it will be taken off the whole executory; and a legacy will be due out of the dead's part, and marital affection is a good consideration in support of both^c; and since the children do not collate to encrease her share, it were not reasonable to oblige her to do it to augment theirs.

29. The widow claiming her legal share not bound to collate gratuitous bonds or legacies.

^d Tit. inst. et ff. de lege falc.

THE dead's, or deceased's part is, "That share of one's moveable estate, which he may freely dispose on death-bed, or by Testament," so called, because the deceased had full power over it. A man that has neither wife nor children unforisfamiliarized, may dispose of all his moveables in that manner; for the Falcidian law, which took place among the Romans, does not obtain with us. By it one could not give away more of his estate by testament than three fourths, the other fourth being to be left with the heir. It was so called from *Falx* a hook; because it cut down the legacies so far as above such extent^d.

30. The dead's part as to all unmarried people, the whole of their moveables; but as to a man that has a wife or children, or both, it varies accordingly.

^e Reg. maj. lib. 3. cap. 36. § 7. ^f P. 1644. c. 15.

A WIFE, as to her moveable estate, viz. her share with her husband in the communion of goods, and her Paraphernalia, and moveable bonds exclusive of her husband's interest, may make a testament in prejudice of her children, or otherwise dispose of them as she pleases, by testament, without consent of her husband, which she could not do by our antient law^e. By an act of one of the rescinded parliaments, in the case of a minister's wife predeceasing him, her executors were intitled to no share of his books^f. We have no such law at present; but if he intends to keep his books wholly to himself, he must give his wife's executors an equivalent.

31. A wife may freely dispose of her moveables by testament.

A MAN that has a wife, and no children in family, may dispose only of the one half of such moveables as fall under the communion of goods; (the other half being the wife's *jus relictae*, or legal share).

32. The wife's and childrens legal shares.

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But if his wife is otherwise satisfied, and has renounced her *jus relicta*, or share in the communion, he may dispose, by testament, of the whole, where he has no children unforsfamiliated. One that has both wife and children in family, can only dispose of the third of the goods in communion, one third being the wife's *jus relicta*, and another third falling to the legitim; and of the half of such moveables as fall not under the commnion, the other half going to complete the legitim; but the wife has only interest in those goods which are in communion.

33. In what respect does the mother contribute to the legitim.

It may be thought that the mother does not contribute to the legitim, or legal provision of the children; but that is not the case: for the legitim, including the share of the goods in communion between husband and wife, abates her part as much as it does his share, called the Dead's Part, and consequently the mother bears a proportion of the same.

34. What if the wife accept a provision in full of all her claims by the husband's death.

If, in the contract of marriage, the wife accepts certain provisions, "In full satisfaction of all that she could claim by her husband's death," it will be presumed to comprehend the case of her own predecease, and, in that event, exclude her nearest of kin; because the communion of goods is understood to be past from by the parties, and the not expressing both events will be deemed to happen thro' inadvertency of the writer^a.

^a Jan. 6.
1746. Crawford.

35. What period is regarded as to the dead's part, wife's share, and legitim.

THE state of one's family is considered as at his death, in respect to the legitim or wife's share: thus, if one leave children, of whom the eldest son succeeds to his land-estate, and who dies without issue, the next who succeeds to him retains his share of the legitim, and tho' all the children should die after their father, the wife's interest is not thereby increased. As to the dead's part, the case is considered as it stands at the time of making up titles to it, by confirmation or possession; so that only the children, or other next of kin then existing, regularly are intitled to the same.

36. What debts affect the executory; the case of the funeral charges of the wife.

MOVEABLE debts due by the deceased come off the whole head of the executory; so that if these exceed the effects, there is understood to be no executory; in that case *debita excedunt bona*. But if there is free executory, in the division of it, bonds due by the husband, bearing interest before the dissolution of the marriage, are not computed in a question with the relict; because she has no share of such debts due to the deceased. The wife's funerary expence affects her own share only, as being understood a debt of her's, to which therefore her executors are subject, and the husband is only liable for it in point of humanity and duty, if she left no sufficient funds of her own. This may happen where she has no proper estate, and has accepted of a liferent provision, in the case of her survival, "In full of all she, or her next of kin, could claim in the event of her predecease;" which kind of settlement is commonly used.

37. Whether does one's funeral expence affect

BUT the funeral charges of burying the husband, and expences of his death-bed sickness, come off the whole head of such subjects as were in communion, and consequently the wife's share bears a proportion

*Dirlt. verbis
(funeral
charges.)

b L. i. ff. de
relig. et
sumpt. fun.

* June 20.
1718. Mon-
crief.

d Decem. 12.
1712. Mac-
Aulay.

e Feb. 12.
1662. Bells.
Feb. 14.
1677. Buc-
cleugh.

proportion of that burthen, in the same manner as of servants fees, and other simply moveable debts, of such kind as fall under the communion of goods, when due to the husband. As to the funeral expence, lord Dirlton gives his opinion, that it should affect the dead's part only, as not being a debt contracted during the communion^a. But the case is otherwise. The debt for one's funeral expence is originally contracted at his birth, which subjects him to the necessity of dying, the consequence of which is the funeral rite: and therefore Ulpian justly observes, that *Qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum hærede*^b. But the same, and the husband's other simply moveable debts, must not be deducted off the whole head of his executory, but only out of the effects in communion, in a question with the relict, as just said.

If there is an heir, against whom the relief for the heritable debts is good, there needs no consideration to be had of these, when the executors account among themselves, or with the widow and children; but otherwise, the heritable debts, as well as moveable, must be considered, and proportionable relief is competent to them against one another, as they shall be distressed.

ALL legacies, and gratuitous deeds contracted on death-bed, burthen only the dead's part; but the wife's mournings, and aliment of the family till the term, where such are due, come off the goods in communion; because they are understood as debts contracted by the husband, since he was under obligation to furnish them, in the same manner as the expences of the burying^c.

As the *jus relictæ*, legitim, and dead's part, vary in the respects aforesaid, so they do in the transmission from those interested therein, to their representatives. Thus the widow transmits her share to her nearest of kin, as she would have done if she had predeceased her husband, her interest being deemed a share in the communion of goods, which opens by the dissolution of the marriage, and is not a succession; and the children surviving their father, tho' dying before confirmation, transmit the legitim to their executors, they having a radical right in it upon the death of the father, which immediately takes place by act of the law, and therefore is termed Legitim, *i. e.* the portion due by law; tho', if they had predeceased their father, they would have transmitted nothing, as is already shown. At the same time, there must be a confirmation as to the whole effects of the deceased, that it may appear what share the widow and children are intitled to draw after payment of the debts; and therefore they cannot sue the debtors, but only the executors confirmed, if they are not confirmed themselves^d, tho', as to vesting of the right, or transmission of the same, confirmation is not necessary.

WHEREFORE, 'tis only the dead's part that is the proper subject of confirmation; and the children that die before that is expedited, tho' they outlived their father, transmit no part of what falls to them, as nearest of kin, of the dead's part, but it accrues to the survivors, or goes to the succeeding nearest of kin, confirmation being in place of *Additio hæreditatis in mobilibus*^e, an entry to the succession in moveables,

the dead's
part only, or
come off the
whole head
of the exe-
cutory.

38. In the
executors ad-
justing a-
mong them-
selves; how
far regard
had to heri-
table debts
due by the de-
ceased.

39. Legacies
and death-
bed gratuities
affect only
the dead's
part.

40. How far
confirmation
necessary, in
order to the
transmission
of the wife's
share, or of
the legitim.

41. The
dead's part
the only pro-
per subject of
confirmati-
on.

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ables, as to the dead's part; under the exception after mentioned, as to the *ipsa corpora*, or species of moveables, the property of which the nearest of kin acquire, by attaining possession of the same, and in respect to bonds paid to them, or corroborated by the debtors.

42. The
quots of te-
staments.

AND, for this reason, the Quot was only due out of the dead's part. It was "a *quota* or proportion of the free effects granted by law to the "bishop or his commissars, for confirmation of the testament," whether testamentary or dative, *viz.* the 20th part^a. These quots are now taken away by statute, without prejudice to the commissars and their clerks, as to the ordinary fees of court, for confirmation of testaments^b. This exception supports exacting of a composition still paid to the commissars and their clerks, as likewise the other dues of court. The quots were due to the widow and nearest of kin of bishops for all testaments confirmed within the time of the ann; but for no other, tho' the person died in the bishop's time, because the quot was due for the confirmation^c.

^a Instruct. to
the commif-
sars, anno
1666.
^b P. 1701.
^c 14.

^c July 6.
1676. bishop
of Edin-
burgh.

43. Caution
found at con-
firmation;
the case of
minors con-
firmed execu-
tors.

EXECUTORS of course find caution at confirming; and, if they are minors, the up-givers of the inventory for them find the caution; who, and their cautioners, are answerable to the minors, and others interested in the executory for the same. This is the case of a father's confirming his children executors, as administrator to them: and even the mother, or other near relation, may undertake that office of humanity, finding sufficient caution to be answerable to all concerned in the executory; which implies, that they shall be accountable to the minors, as well as the creditors of the deceased.

SECTION II. *Legacies.*

44. Legacies;
the effect of
substitutions
in them.

TESTAMENTS frequently contain Legacies, tho' these may be left in any other writings; but they can only be out of the dead's part. A legacy is "A kind of donation by the testator, to be made good to the "legatary by the executors." A legacy may be clogged with a substitution, *viz.* To Titius, and failing of him to Mevius. It is, for the most part, of the nature of a vulgar substitution among the Romans, so that the substitution evanishes, if the legatary outlive the testator; which is quite otherwise in substitutions and tailies of lands. There is, however, no doubt, but, as bonds or assignations to them may be qualified with substitutions, so as the substitute's right shall take place, even after the institute's succeeding thereto, the like may be done in legacies of bonds; but still with the implied condition, "That, if "the institute have lawful issue, the substitution shall not take place." Thus, where a disposition of a testamentary nature was made to one, and failing him to another, the institute having died before the grantor, leaving issue, the court found his children intitled to the effects, in virtue of the deed, preferable to the substitute^d. And the case of a legacy, thus qualified, seems not to be different.

^d Decem. 7.
1744. Wal-
kers.

45. A legacy
either univer-
sal, special,
or of a sum
of money in-
definitely. A

A LEGACY is either Universal or Special, or of a sum of money in general. An universal legacy carries the whole dead's part, a special or specific bequest is of some particular thing, as such a bond due by a certain person, or such a particular horse or cow, or other individual.

vidual. A legacy of a sum in general is, where "a sum of money is bequeathed, without respect to any particular bond;" this may be called a General Legacy, as affecting the whole executory, in contradistinction to a Special Legacy, in virtue of which the legatary can only insist for the particular thing itself. If a sum is bequeathed for a pious, or other particular use, which may be called a Legacy *sub modo*, as the building of a bridge, the whole must be applied that way; or, if there is a residue, it must be employed for the like use, unless it appear from the will that the legatee was to have it^a.

legacy sub modo.

^a June 18. 1678. commissioners of Berwick-shire.

^b March 12. 1627. Forrester.

^c July 21. 1665. Spreul.

A SPECIAL legatee has a proper interest in the subject, and, without confirmation, may pursue the havers or debtors, calling likewise the executor for his interest^b; because all the executory may be exhausted by debts, which are always preferable to legacies. But special legacies will not admit a proportionable defalcation with other bequests, in case of deficiency of funds; for, if the particular thing should perish, or the bond become ineffectual, the legatary would get nothing, the executor not being liable to make it good^c; and therefore, the rule must hold, that *Cujus est periculum, ejus est et commodum*, the party who incurs the hazard, must have the benefit.

46. The peculiarities in a special legacy.

A LEGACY is due, if the legatary outlive the testator, tho' he die before confirmation; because it becomes a debt immediately upon the testator's death, and affects his executory; and, for the same reason, an executor that is appointed likewise Universal legatee, tho' dying before confirmation, transmits his right to his executors.

47. Legacies become good by the legatee's outliving the testator.

IT is not only a general legacy, where a particular sum is bequeathed, without describing special funds out of which it is to be paid; but likewise, where a horse or cow in general, without pointing any particular of the kind, is left, and then the legacy is due, tho' the testator had at his death none of these particulars. The legatary, in this case, cannot claim the best, nor is bound to accept the worst of the kind; nor where the heir has the election, can he offer the worst, so that one of the middle sort is the rule^d; and, if the testator had any of the kind, the legacy can only be made effectual thereout. But, if the legacy is of a house in general, or of any such like subject, that has no particular limits from its nature, it is elusory, unless the testator had some of the kind^e. And regularly the legatee has the election, where it does not appear from the terms of the bequest, that the testator intended the heir should have it.

48. In a legacy of a horse or cow in general, or such legacy of a house, what due.

^d §. 20. inst. de legat. l. 3. ff. de tritico vino, &c. l. 37. ff. de legat. lmo. ^e L. 71. ff. cod. tit.

IF the testator bequeaths what does not belong to him, believing it was his own, the executor regularly is not bound to make good the thing, or the value; because, it is presumed, if he had known it was not his, he would not have left it. But, if he knew it was not his own, or, if there is a strong presumption, that tho' he had, he would notwithstanding have left it or the equivalent, as if the legatary is his very near relation, the legacy or the value is due. The presumption is, that the testator believed the thing to be his own, from his bequeathing it; and therefore, it is incumbent on the legatee, in order to support his legacy, to prove, from circumstances, that the testator knew that it was not his own^f. The like rule will

49. Legatum rei alienæ, a legacy of an heritable bond deemed such. If the testator renders a moveable bond bequeathed heritable, the legacy thereby revoked.

^f § 4. inst. de legat. l. 10. ff. cod. tit. June 24. 1664. Falconer.

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hold, where, tho' the thing left be the testator's, yet he had not power to legat it; for in that respect it is *res aliena*, as in the case of heirship-moveable, an heritable bond or adjudication bequeathed^a, and must be made good out of the executory: or, if a wife legat a bond which fell to her husband *jure mariti*, her executor must make it good out of the other effects. And it is presumed, the testators knew that they could not legat such sums, and the ignorance of such plain point of law will not relieve the executors from making good the legacies^b. This proceeds upon the principle of *Legatum rei alienae scienter legatae*, i. e. a legacy of a thing belonging to another, and which the testator knew to be so; for otherwise the executor is not liable in warrandice, or bound to make good any special bond, or other thing legated. But, if the testator made a moveable bond heritable, after the legacy, it is not due, that importing a revocation of the legacy^c.

^a July 19.
1745. Pater-
son. obl. by
Falconer.

^b June 23.
1748. Courts.

^c Jan. 22.
1624. Drum-
mond. June
16. 1664.
Murray.
Decem. 3.
1674. Cran-
ston.

50. Gratuitous bonds on death-bed preferable to legacies.

GRATUITOUS bonds on death-bed are not good against the heir, the wife's interest or childrens legitim, more than legacies. But, in respect to the dead's part, they are preferable to general legacies, and so must be paid in the first place, and the remanent free dead's part is subject to the legacies, or goes to the nearest of kin; because bonds are debts, and, as to the dead's part, may be freely granted on death-bed. Now legacies are not due, but after payment of the debts, properly so termed; tho', in a general sense, legacies become debts upon the executory after the testator's death.

51. The import of one's being named universal intromitter.

IT has been already observed, that an executor nominate, being a stranger, has a third of dead's part for executing the testament. And farther, when one appoints an executor, with the addition of (Universal intromitter) it is only explanatory of his office, which is to intermeddle; and he can take no more, by such nomination, than the third of dead's part, after payment of debts and legacies.

52. The same thing legated to more persons in solidum; how far the right of accretion takes place on failure of any of them.

By the civil law, where the same thing was left to two or more, not by equal parts, but Intirely, and *in solidum*; in case they all outlived the testator, they got their equal shares, *Et concursu partes fecerunt*, and transmitted the same to their executors; but, if any of them deceased before the testator, the portion of the deceasing accrued to the survivors, by the right of accretion^d. We have not for ordinary the custom of leaving the same thing intirely to different persons; but, if it should happen, and it appear that the testator meant no revocation, there is no doubt we would follow the same rule, the testator's meaning being plain, that the legatees surviving should have the thing equally among them, and that if any of them predeceased, the rest should have it wholly. This *jus accrescendi* is frequent with us in mutual substitutions, in bonds of provision to children, the import of which I have fully set forth elsewhere^e.

^d L. 80. l. 89.
ff. de leg. 3.

^e Sup. tit. 1.
sect. 1. b. 2.
tit. 3. § 151.

53. Legacies revoked expressly or tacitly, sometimes irrevocable.

LEGACIES are still revocable, unless the testator become bound to leave a particular legacy; in that case it is due in virtue of the obligation, and which cannot be effectually revoked, more than an obligation to pay a sum at one's death; for, tho' such pactions were void with the Romans, yet we sustain them^f. A legacy may be revoked,

^f July 6.
1630. Aiken-
head.

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revoked, either expressly, or tacitly. Thus, the voluntary alienation of the thing bequeathed, or willingly uplifting the bond, and not employing it, will infer revocation. But 'tis otherwise, if the alienation was necessary, or the debtor forced the payment, and the money was re-employed on a moveable security; for then the testator will be presumed only to have been exercising lawful acts of administration, but not to have intended to prejudice or recal the legacy^a. A transferring the legacy from one to another, or doing deeds inconsistent with the bequest, will infer a virtual revocation, as by discharging the debtor of the bond legated. But an universal legacy, granted by a posterior deed, will not infer a revocation of a prior special or particular legacy, unless it is expressed^b.

^a L. 12. § 12.
l. 64. ff. de
leg. 3. l. 28.
ff. de adim.
leg.

^b L. 82. § 1.
ff. de leg. 1.
l. 80. ff. de
reg. jur. Nov.
1722. Max-
well.

^c L. 1. ff. de
injust. rupto,
&c.

^d Voet. de
donat. M. C.
§ 7.

^e L. 17. pr. ff.
de pœnis.

^f § 6. inst. de
legatis.

^g B. 1. tit. 4.
§ 16. 22.

^h §. 4. inst.
de verb.
oblig. l. 42.
ff. de oblig.
et action. l. 5.
§ 2. ff. quan-
do dies leg.
cedit. l. 104.
§ 1. ff. de le-
gat. 3.

BESIDES revocation, there are divers ways whereby legacies become void; 1. By the testator's designed cancelling the writing containing them; but the legatary proving it was accidental, the legacy is still due, if it is legible^c. 2. By the legatee's dying before the testator, unless the legacy is bequeathed "To him, and his heirs or executors," for then the heir is legatary, upon the decease of the person first named^d. It would be otherwise, if the legacy were left to one "For himself and his heirs," for then it is not bequeathed to the heirs, that being only an useless adjection of what is implied, upon the legacy's taking effect in the person of the legatee. The like rule would seem to hold, if the legatary becomes, in the testator's life, disabled to hold or enjoy the legacy, as being attainted of treason, or turning a monk, for thereby he becomes civilly dead^e. 3. The legacy becomes likewise extinct, if the legatee, in the testator's life, acquire the thing bequeathed on a lucrative title, for, in such case, he cannot demand the value; but, tho' he acquires it for an onerous cause, he may have the value, as in the case of *Legatum rei alienæ scienter legatae*^f. 4. By the legatee's repudiating the legacy, either expressly, or tacitly, by refusing the burthen of tutory, or other condition annexed to it. 5. By defect of the condition, if it is casual; but, if it is a potential or voluntary condition, then the legatee, doing all in his power to accomplish it, makes the legacy to be due, as I have observed on conditions in general^g. Where I have likewise taken notice of this difference between conditional obligations and conditional legacies, that, in the first, the creditor dying while the condition is pendant, transmits the hope of the obligation to his representatives; whereas, in such case, a conditional legacy becomes void^h: the rule being, that, if the legacy does not become effectual in the person of the legatee, it cannot be profitable to his representatives, unless it is otherwise provided, as just said.

54. Other cases, where legacies become void; particularly the legatary's predecease, incapacity, lucrative acquisition, repudiation, and defect of the condition.

SECTION III. Obligations incumbent on Executors, and Privileges competent to them.

AN executor has the office of executing the testament, and therefore is liable to exact diligence in recovering the subjects, as to creditors; nor is there any reason for exempting him from the same, as to the nearest of kin, wife, or legataries, who are truly creditors to the executor for their interest in the executory, after payment of the debts. The inventories in the confirmation prove the existence of the

55. To what diligence is an executor liable.

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the particulars therein contained, and is a charge against the executor, who must shew how he was excluded. Therefore, if the subjects of the inventory perish, by the default or negligence of the executor, he is still liable to make them good ^a.

56. What is the executor liable to, in respect to special legacies.

IN special legacies, whether of bonds or particular goods, the executor ought forthwith to make them over to the legatee, after confirmation, when required, if there is no doubt that such legacies will be free, after payment of the debts; but otherwise he is not bound till it appear, if there is a sufficient fund for the debts. In the mean time, he ought to adhibit due care, that the thing perish not, for he must execute his trust faithfully, as above. He needs not confirm such special legacy, and then he can only be bound to notify to the legatee his willingness to concur with him in a process against the debtors or havers, or otherwise for making the legacy effectual; he being always secured by caution against debts that may afterwards appear, if there is any ground to suspect such.

^a Feb. 7.
1679. Pearson. Jan. 29.
1681. Gray.
July 23.
1708. Lord Elibank.

57. How far the executor liable for interest of the subjects confirmed.

THE executor regularly is not liable for interest of the subjects confirmed either to creditors or others, except in so far as they bore interest before ^b; for, if he converts them into money, and lends it out, it is on his own risk, and therefore it is reasonable he should have the benefit ^c. But, if the executor is tutor or administrator in law to those interested in the executory, he will, as such, be liable for interest from the time he got the money into his hands, as hath been said of tutors and curators, with respect to their duty in general ^d. And, from common equity, if the persons concerned in the executory-effects have been in suit against the executor for their shares, and have been litigiously opposed, they are found intitled to interest from the time he received the money ^e.

^b June 25.
1705. Robertson. July
1730. creditors of Thomson.
Bruce MS.
July 22.
1716. Hume.
^c L. 10. ff. de reg. juris.
^d B. 1. tit. 7.
^e June 19.
1747. counts of Caithness.

58. In default of an executor nominate, who intitled to the office; and what if one that is not nearest of kin confirm.

IF there is no executor nominate, or he declines intermeddling, or does not apply to be confirmed, there is place for executors Dative; who regularly are the nearest of kin in the line of succession in moveables, of which I have spoken already ^f. All in the same degree of relation to the deceased have an equal interest *secundum capita*, or according to their number. And if a remoter confirm, he is accountable to the nearest of kin, who had right to succeed at the time of the confirmation; for they transmit their shares thereafter to their executors, whether executors nominate or dative confirm; because they are the proper successors, and the executor, as *curator bonorum*, has only a trust by the confirmation, if he is not nearest of kin, legatary or creditor, or otherwise concerned, for his own interest ^g. There is this only difference as to the nearest of kin, that those of the whole blood exclude those of the half blood, not only in the same degree, but likewise in a nearer; so that if there is any issue of brothers or sisters-german, those bar the brothers or sisters-consanguinean, tho' in a nearer degree. Thus, the nearest of kin, (in default of executors nominate) have the preferable right to the office, but the remoter will be admitted, failing application by the next of kin for the office of executory. The relict, creditors, or legataries may, in default of the next of kin, apply and confirm, who will be liable to account to

^f Sup. tit. 4.

^g Feb. 14.
1677. Belshes.

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to all others concerned, according to their respective interests in the executory.

OF old, the goods of the intestate were under the administration of the bishop of the diocese where the deceased had his residence, to be distributed at the sight of his near relations, for payment of the debts and otherwise. And if such deceased was a foreigner, the bishop intermeddled likewise with the effects, and was answerable to his nearest of kin; and, in default of such, they behoved to be applied to pious uses^a. But thereafter charges, at the instance of commissar-fiscals, against the next of kin, to give up inventory and confirm, especially for the benefit of the quot, were introduced^b. The commissar cannot now cause charge the nearest of kin to confirm, and, in default of their confirming, give the office to his procurator-fiscal, or any other, as executor surrogate in his place, as was the custom of old; those only above mentioned, interested in the deceased's effects, can claim the office of executors, by the late statute^c. A creditor or legatee need confirm only what they think sufficient for their own payment; but if they confirm more, they are equally liable in diligence with other executors, and must account for the overplus to those having interest^d.

^a Stat. W. I.
c. 22. and
20.
^b P. 1669.
c. 79.

^c P. 1690.
c. 26.

^d Act of sed.
Nov. 14.
1679.

59. The law of old, as to charges to confirm, now abolished.

By an express statute in behalf of creditors, if a moveable estate fall to the nearest of kin, who lie out, and do not confirm, their creditors may obtain themselves decreed and confirmed executors dative to the deceased, as if they were creditors to him; with this provision, That the creditors of the deceased, doing diligence to affect his executory within year and day of their debtor's death, shall be preferred to the diligence of the creditors of the nearest of kin^e.

^e P. 1695.
c. 41.

60. If the nearest of kin lie out, what remedy have his creditors by the statute 1695.

WHEN one or more confirm as executors nominate, or dative *qua* nearest of kin, there can be but one such principal testament confirmed, more being inconsistent; for they are universal representatives of the deceased, so far as the title of executory extends. But if there is any thing left out unconfirmed, or if the goods confirmed are too low appretiated, there is place for executors *ad omiffa, vel male appretiata*, i. e. in respect to what is omitted, or wrong appretiated, who must likewise be creditors, or others interested in the executory. They must cite the principal executor, (not being an executor creditor) who will be preferred to eik or add the subjects in question to the principal testament^f; unless they were fraudulently omitted, but otherwise the person that served the edict *qua executor ad omiffa, aut male appretiata*, will be decreed and confirmed as such. This was the usual course of old.

^f Feb. 14.
1623. Bane.
March 12.
1631. Duff.

61. Executors *ad omiffa et male appretiata*.

BUT the court of session have of late found, that one, *qua* nearest of kin, confirming a part, makes up a title to the whole effects, so as the same shall descend to his next of kin, or be affectable by his creditors^g. And, by the same rule, the executor confirmed is liable for the true values, without any confirmation *ad omiffa, vel male appretiata*, the original confirmation being *Additio hæreditatis in mobilibus*. But that cannot hinder creditors to confirm such particulars, in order to prefer themselves thereon, if they see cause. A partial con-

^g Jan. 23.
1745. execu-
tors of Mur-
ray.

62. How far at present confirmation *ad omiffa et male appretiata*, takes place.

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firmation was formerly found sufficient to transmit what was eiked or added to the testament after the executor's death ^a: and I should humbly think the import of the foresaid judgment is no more as to *nomina*, viz. bonds, or other such effects omitted; and still the party who intermeddles, after a partial confirmation, with subjects omitted, cannot be safe against the passive title of vitious intromission ^b.

^a Fount. June 7. 1702. Chiefly.

^b Arg. P. 1690. c. 20.

63. How far the values put on the goods in the inventory a charge against the executors.

THE values put on the goods by the commissars, or the extent of them as mentioned in the confirmation, are presumed to be just, but may be redargued by a contrary proof. Hence, if stacks of corn are given up at so much, before proofing them, the executor will be liable to the full extent, as it afterwards comes out on proofing, and will likewise have deduction if they fall short ^c. But the values put by the deceased on his own goods will be the rule of accounting, in respect to the free dead's part; because the overplus value will be understood as bequeathed to the executor. But as to the wife's share, legitim, or interest of creditors, if such prices are below the just values, the executor will be liable for the true prices, and bound to give his oath on the prices received ^d.

^c Nov. 6. 1679. Bruce.

^d Feb. 2. 1672. Nimmo. Dirlt. decif. 97.

64. Must the executors make oath upon the inventory; how far liable for the contents of it.

EXECUTORS are bound to give up the inventories on oath, but that is much diffused: however, still they may be compelled to give their oaths upon the inventory, if any party therein concerned insist for the same. The executor is accountable for the bonds, as stated in the confirmed testament; and tho' it consisted with his knowledge that part of them was paid, it will not relieve him, unless such payments are duly instructed; because the executor's knowledge can only prejudice his own interest ^e. However, since he might have confirmed only what was owing, it is his own fault if he suffers by such erroneous confirmation of sums not due. One by confirming, *ad male apprehentiata*, gains to himself a preference on the overplus price, as just said; but otherwise the original executors are answerable for the whole produce of the executory, deducting all charges, damages and deficiencies ^f.

^e D. decif. Bruce.

^f Dirlt. d. decif. 97.

65. Creditors may confirm, one after another, the same subject, or may be conjoined in one confirmation.

IF only an executor-creditor is confirmed for his own payment, other creditors may thereafter confirm the same subjects, or things that are omitted, without citing him; and then they may compete, who shall be preferred, the confirmation being, in that case, only a step of legal diligence ^g, but not a representation of the deceased; as is intended, where executors nominate, or nearest of kin confirm. When a creditor applies for confirmation, other creditors may insist to be conjoined, which will be granted, they all having equal interest.

^g Jan. 2. 1708. Ramsay.

66. How does a general disponee confirm.

A GENERAL disponee confirms executor-creditor on the express or implied warrandice in the disposition; and where the disponent remained in the possession, the onerous creditors will be preferred to the disponee who expedites confirmation ^h, such disponee being only regarded as a gratuitous creditor, to whom onerous ones are justly preferred, notwithstanding the confirmation of such general disponee, which intitles only to administer and dispose of the subjects. But if such general disponee competed with a particular creditor for the office, the disponee is preferable; for he is impowered by the deceased as an universal

^h June 19. 1711. Liddle.

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universal administrator of his effects, and in a manner wants only the name of Executor, which ought to be supplied by the judge.

^a D d. instructions, anno 1666.

ALL executors, whether nominate by the deceased, or dative, must, before confirmation, find caution in the commissar's books, to make the contents of the inventories to be confirmed forthcoming to all concerned^a; and the confirmation is a warrant from the commissars to the executor to intermeddle with the whole subjects contained in the inventories. If the confirmation proceed on a nomination of executors, the confirmation is termed Testament Testamentar; but if it is of executors given by a decree-dative of the commissar, it is termed a Testament Dative, (as observed in the entry) in favour of the executor dative, either as nearest of kin, relict, general disponent, creditor, legatary, or other person, conform to the title whereon the decree proceeds. But an executor nominate needs no decree declaring him executor; for he has right to the office by the nomination.

67. The duty of executors in confirming.

^b June 30. 1705. Jackson.

^c Jan. 23. 1745.

If the subject of the executory is desperate or doubtful, the executor uses not to expedite a confirmation, but to take out from the commissar a licence to pursue havers or debtors, either upon the nomination or decree dative. If such executor die before confirmation, his right and inhibitions, or arrestments on the dependence, commonly vanish; because the office cannot transmit^b. But if such executor was an universal one, as nearest of kin, and there was a confirmation of part, tho' the debt pursued for, in virtue of the licence, was not confirmed, it would seem to follow, from the late decision in the case of the creditors of Mr. Murray^c, that the depending action, after the executor's death, may be prosecuted by his nearest of kin, or creditors confirming executors to him; and consequently that the inhibition used by the executor who pursued on the licence, may still subsist, since decree may be recovered on the dependence after his death, and the sum may be eiked or added to the confirmed testament, before extract.

68. Licence to pursue, and diligence pursuant thereto; does it fall by the party's death, before confirmation.

^d Arg. Dirlet. decif. 216.

THOSE licences use to be qualified *Excludendo sententiam*, that no sentence or decree shall be extracted till confirmation; and tho' it is not so qualified, yet, if the executor extract his decree before confirmation, it will generally be void: however, such executor, by a licence, having a good title *ad inchoandam litem*, or to carry on a process at his instance, it will interrupt prescription, even tho', as to other effects, the diligence used on the dependence should fall with the licence, by the pursuer's decease without confirmation^d. An executor may pursue upon the decree dative, before the commissar who gave it, without any formal licence, that being implied in such decree.

69. The effect of the proceeding, where a licence is the title.

^e Decem. 9. 1628. Mackie.

THE wife's interest is indeed her share in the communion of goods; and tho' she transmits her right without confirmation, yet, because she has a third or half *pro indiviso* of the whole, she cannot regularly come at the possession of it without confirmation; for the bonds or other rights are understood to be *actu* in her husband's person, and so the creditors or havers are not bound to pay or deliver to her without confirmation^e. But if she divide with the children, and get her own share of the executory, it will infer no vitious intromission, tho'

70. Of what use confirmation as to the wife's share and the legitim; what if they die before it is expedited.

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tho' she does not confirm, if there is a confirmation expedited by them, notwithstanding it does not include the goods allotted to the widow; for not only does such partial confirmation, in some respect, vest the whole executory in them, as I took notice above, but likewise she openly intermeddles with the goods, upon the title of property, as her own share in the communion. As to the childrens legitim, it is likewise transmitted without confirmation; but being only a proportion, *pro indiviso*, of subjects that were the property of the father, a confirmation is necessary to the above effect. If wife or children, outliving the deceased, die before confirmation of his testament, their nearest of kin must confirm executors to them, and thereby state the right of the wife, or childrens legitim, in their persons; and thereafter confirm executors to the first deceased, if no other is confirmed to him, in order to obtain decrees against the debtors to the deceased.

71. Execution of the testament; what if the executors die before execution.

THE executors, by their office, ought to proceed to execute the testament, which is done by assuming possession of the goods, or obtaining decree against the debtors, or getting payment or bonds of corroboration from them. Before the testament is executed, the executors of old had not the deceased's rights perfectly stated in their persons; and therefore, if they died before it was executed, there used to be given executors *ad non executi*, concerning which I shall discourse at large hereafter.

72. The case of executors creditors dying before executing the testament.

EXECUTORS creditors confirm for their own payment; and therefore, tho' they did not recover sentence against the debtors, or otherwise execute the testament before their decease, there was no place, even of old, for executors *ad non executi*; for, without such proceeding, they effectually transmitted the subject to their executors, so far as concerned their own interest^a. Where creditors confirm more than satisfies their own debts, they are in that respect as other executors, who have only the naked office; and being equally liable in diligence, their representatives are answerable for the overplus, if the subjects perished by their fault, or the deceased executor-creditor had intromitted with them^b.

^a D. decis. Downey.

^b Gilm. decis. ult.

73. The relief competent to the executor against the heir.

THE office of executor obliges him to recover the effects of the deceased, or to use proper diligence for that purpose, conform to the warrant in the confirmation, and thereout to pay debts and legacies, in due course. And, by our old statutes, he was bound to answer the creditor within the year after the testator's death, in which time the heir could not be pursued, in respect of his year of deliberation^c. And, from the statutes just referred to, it would seem, that the executor behoved to answer all debts, without relief against the heir as to heritable debts. But the course of law hath since gone otherwise, as I have observed elsewhere^d; and this is plainly supposed to be our law, by the purview of the statute 1669^e, which ordains, That there shall be no abatement of the quot, on account of heritable debts owing by the deceased, where there is an heritable estate that belonged to him for satisfying the same.

^c P. 1504. c. 76. P. 1540. c. 106.

^d Sup. tit. 4. ^e P. 1669. c. 19.

74. The manner of executing testa-

EXECUTORS ought to execute the testament, by obtaining decrees against the debtors, if such decree is not prevented, by the debtors making

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making payment, or becoming voluntarily debtors to the executor, by granting bonds to them for the debts confirmed. In case of an executor's death, tho' after litiscontestation, if before decree, the action of old fell, and there behoved to be an executor *ad non executam*, who must have brought a new action in his own name^a. Such executor was confirmed to the first deceased, but was accountable to the next of kin of the executor confirmed, who died before the testament was executed; but, if there was a co-executor, the office of executing the testament accrued to him. But now, if a bond was registrable at the deceased's instance, the executor will obtain a homing without any previous decree against the debtor, in force of the statute, upon producing his confirmation of the debt, or other title to it, and may proceed in any action that was depending at the deceased's instance, upon his own title, without transferring the suit *active*, which was the tedious custom of old, happily rectified^b. By this statute, confirmations *ad non executam* became unnecessary, and accordingly have ever since been discontinued^c.

ments of old, and at present.

^a Feb. 20. 1627. duke of Lennox. Fount. Nov. 29. 1677. Ibrand.

^b P. 1693. c. 15.

^c Hume (executor) 278. June 24. 1737. Mitchell.

As executors strangers nominate are intitled to a third of dead's part, it may seem to be given them for their trouble in executing the testament. But I conceive, that, tho' they die before that is done, the persons interested in the executory will be liable to allow their representatives the same at counting; because the statute declares their interest to be the third of dead's part, which formerly was interpreted to carry the whole of it; so that, whether the testament was executed or not in their time, they have the third. But, it may be doubted, if this statutory grant of the third of dead's part takes place, in case the executor die before confirmation of the testament? For answer, on duly considering the terms of the statute, and intent of the same, it would seem, that this third will not be due in that case; for it extends to all persons then already nominated executors in any testament, *not as yet confirmed*; and consequently their right only was to become effectual by confirmation, and the office is never fully established in them without it, that being *Additio hæreditatis in mobilibus*.

75. If an executor stranger nominate, die before execution of the testament, is he intitled to the third of dead's part.

AFTER the testament was executed, the right to the effects of the executory was fully stated in the executor's person, even where he had only the naked office. Hence any co-executor, after such execution, might proceed in diligence for his own share of the debt, discharge it on payment, or assign it, without troubling himself with the rest; but his discharge was sustained no farther^d. All which they may now do, even after the simple confirmation, which vests the subjects in them, under the proviso subjoined; whereas formerly, that was only accomplished by executing the testament.

76. By confirmation the executory effects vested in the executors.

^d March 17. 1630. Semple. Jan. 25. 1665. Menzies.

BUT if, even after execution of the testament, the subjects still remain unlifted or consumed, the creditors of the deceased, or others radically interested in the executory, are preferable to the creditors of the executor^e; because his right is only fiduciary, and in trust for others concerned. But, if the debts are paid to the executor, the debtors are safe, as likewise are the purchasers from them of the moveables confirmed.

77. What if the subjects are in the hands of the executors, and others be interested in them.

^e Decem. 16. 1674. Kelhead.

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78. In a disposition of moveables, the intruster, and others interested, preferable to the trustee and his creditors; what if he or an executor is forfeited.

AND, for the like reason, if one has a general disposition to moveables, with the burthen of the granter's debts, or for behoof of the granter, or of others, while the subjects are extant in the trustee's hand, the truster, or his creditors, or others interested, will be preferred to the trustee, or his creditors. But, if the subjects are disposed of, or the debts paid, the purchasers or payers are safe, by the rule, that *Mobilia non habent sequelam*^a. For the same reason, such trustee, or an executor, even after the testament is executed, forfeits, by his crimes, only his own proper interest in the subjects conveyed, or in the executory, whether the third of dead's part, or as one of the nearest of kin, or as having paid debts due by the deceased, or other claims on the executory^b.

^a Decem. 17. 1675. Master-ton.

^b Decem. 21. 1671. Gordon.

79. The effect of a discharge granted by an executor.

THUS likewise a gratuitous discharge by an executor can only be sustained, so far as concerns his own proper interest, but will not be prejudicial to the wife, nearest of kin, creditors or legataries of the deceased^c; because the execution of the testament does not create the executor absolute proprietor of the subjects, farther than his own interest extends, and as to the overplus he is only a trustee.

^c Hume decif. 28.

80. The case of assignations made by executors.

ASSIGNATIONS granted by executors of the debts due to the deceased, being duly intimated, were in the same case with respect to the executors or subsequent deeds granted by them in prejudice thereof, as other assignations, provided the executors were living at the time of the assignee's executing the testament, by decree against the debtor, by our old law^d; and now the confirmation stating the right in the executor's person, his death, before execution, does not alter the assignee's case in any respect. But such assignation by an executor, even of old, could not prefer the assignee to others having a proper interest in the executory, if they competed before the debt was uplifted in virtue thereof, tho' the testament was executed by sentence^e; and much more now, when the want of such execution does not alter the case in that respect.

^d Nov. 24. 1674. Buslle.

^e D. decif. Decem. 16. 1674. Kel-head.

81. The case of the act of federunt 1672, as to the citation of executors confirmed within six months of the deceased's death.

BECAUSE the death of the debtor might not presently come to the knowledge of some of his creditors, whereby others might exclude them by diligence; therefore, it is provided by act of federunt^f, That all creditors who do diligence within half a year of his death, by confirming themselves, or by citing the executors confirmed within that time, are equally preferable; and therefore, if such citations are used, the executor ought to call the persons interested in a multipointing, that they may debate their interests. If no diligence is done by others within the half year, the executor-creditor confirmed in that time is preferred for his own debt. After expiring of the half year, creditors confirming are preferable, according to the dates of their respective confirmations.

^f Act of feder. Feb. 28. 1672.

82. The act only concerns executors creditors; the rule of preference of creditors, where an u-

THE privilege introduced by the act of federunt, above referred to, concerns only the case of executors-creditors confirming within the half year of the deceased's death, that other creditors, citing the creditor confirmed within that period, shall be equally preferable with him on the subjects confirmed. Wherefore, the citing an executor nominate confirmed, or an executor *qua* nearest of kin, or relict, within

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within the half year, has no effect to prefer the citer to other creditors. And neither the first citation, or first decree, against such universal executor, but only payment on lawful sentence, can give a preference to any of the creditors not privileged ^a.

niversal executor is confirmed.

^a Hume (creditors of a deceased) Feb. 15. 1738. Graham.

CREDITORS upon the foot of this act of sederunt, or otherwise, or as being conjoined in the confirmation, are preferable *pari passu* upon the executory, and draw proportionably to their grounds of debt. If one of them is creditor in an annuity for life, he liferents a share of a stock answerable to such annuity, proportionably with the other creditors; and, after his death, such stock is divided between his executors and the other creditors, in proportion to what is still resting, his claim being the deficiency of his annuity ^b.

83. How a creditor in an annuity classed upon the executory.

^b Dalrymple. Decem. 3. 1713. Col. Erskine.

EXECUTORS are not liable to deeds, performable by the heir, in relation to the heritage; but, if the deceased had entered into a minute of contract for purchase of lands, the executors would be answerable for the price, tho' the estate purchased would go to the heirs^c. And, by the same rule, if the ancestor sold his land-estate by a minute of sale, and took the price payable "To himself, his heirs and executors," the price as due by a personal moveable obligation, would go to his executors, tho' his heir would be bound to convey the estate^d.

84. How far are executors intitled to the price of lands due by a minute of sale.

^c Fount. Decem. 22. 1704. Chiefly. Forbes MS. July 7. 1714. Ker. ^d Marcus (executors) Nov. 1683. Forbes.

EXECUTORS nominate, or dative *qua* nearest of kin, jointly represent the deceased, and therefore, they ought regularly to be all summoned by the creditors in a suit for their payment: but, if one of more executors is pursued, and his part of the executory intermeddled with by him, and unexhausted, is sufficient for the debt pursued for, decree will go against him for the whole^e. But 'tis a good defence for an executor, that the co-executors have received their full share of the executory, in order to restrict the pursuer's claim to the defender's proportion, conform to his interest in the executory, reserving action to the pursuer against the rest, or their representatives, for their proportions, as accords, if they are solvent^f.

85. In the case of more executors, is action competent against any of them, without calling the whole.

^e July 23. 1625. Aitkin. July 12. 1626. Turnbull. July 22. 1630. Salmon. ^f D. d. decif.

EXECUTORS have no power to prefer one creditor to another; and therefore cannot pay, but upon lawful sentence, other than privileged debts, *viz.* the funerary charges, and medicaments to the deceased in his last sickness, servants fees for the year or half year, according as they were feed, current at his death, half a year's rent of the house in which he died, and a year's rent to the heritor of the lands, possessed by the deceased, and steelbow goods, which are all mentioned as privileged debts, in the instructions to the commissars, 1666. The executor may also pay, without sentence, debts acknowledged by the deceased in his testament, provided payment is made before citation at the suit of another creditor^g. Of old, debts due to the king had a preference upon the debtor's executory^h; but now the case must be determined by the English statuteⁱ, which is made our law, by the act establishing the exchequer, of which I shall discourse in the proper place^k. The wife's aliment, till the term, is so far from being privileged, that it is not due at all, in competition with

86. How far can executors safely pay without sentence.

^g Instruct. to the commissars, anno 1666. June 7. 1677. Andrew. Nov. 24. 1680. Crawford. ^h Stat. Will. I. c. 21. ⁱ 33 H. VIII. c. ^k B. 4. tit. 9.

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with creditors^a: nor, for the same reason, is the aliment of the family, till the next term, a privileged debt^b.

^aFount. Feb. 10. 1687. Newgrange. Hume (husband and wife) Feb. 1732. Gibson. ^bDalr. Feb. 23. 1714. creditors of Lindsay.

87. Common debts paid without sentence altogether disallowed.

It may seem, that payment of common debts, without decree, should not hinder those debts from being brought in *pari passu* with the pursuer's; but even this is rejected, to prevent all collusion between the executor and some favourite creditors, to the prejudice of others. And, for the same reason, the benefit of easements obtained from any of the creditors, must be communicated to the rest. The first citation gives no preference, tho' it was used within the half year of the deceased's death; except in the case of citing an executor-creditor, in terms of the act of federunt before quoted^c.

^cD. d. decis. Dirlt. decis. 454. d. act of fed. 1672.

88. The method of old for exonerating executors; how do they proceed at present, in order to it.

It was usual of old for executors, in order to be exonerated, to pursue an action before the commissars to that purpose; but such processes are not much used at present, and, when they were accustomed, such decree could not be effectual against any creditor or legatary not therein called. Wherefore executors are to take care that they pay safely, in manner above; and when they find, by their accounts, that the effects are all thus drawn out of their hands, if they are pursued at the instance of creditors who have been remiss, then, in place of such action, at present, they use this defence, *viz.* That the inventories in the confirmation are exhausted by payments to creditors, legatees, or others interested, upon lawful sentences, before citation at the pursuer's instance; or of privileged debts, or other debts acknowledged in the testament, tho' without sentence. But if actual payment is not made, the executors, after citation by another creditor, ought to suspend all decrees taken against them, and raise a multiple-poining against all parties; for otherwise they cannot pay safely. And truly, I conceive, the fairest and safest way for executors, who are afraid the executory will not answer the demands upon it, is to sue an action of multiple-poining, before the court of session, in order to be exonerated, and therein to call all persons interested, that they may receive their proportion in the distribution of the executory.

89. Ranking of creditors on the executory.

In ranking creditors on the executory, the privileged debts aforesaid are preferred in the first place; next, the debts or claims due to the executor, as after mentioned. Thirdly, the other creditors are ranked *pari passu*, and the expence of confirmation, and of the action, is proportioned on all the creditors, as they draw of the subject^d, and the remainder goes in payment of the particular legacies, or to the residuary legatee, or universal legatary; and, if there is none such, to the nearest of kin, after deducting a third of dead's part to the executor stranger nominate; for the nomination of executor carries no more, ever since the old statute aforesaid, as above.

^dArg. act of fed. Nov. 22. 1711.

90. An executor, in suits against him, ought not to omit any obvious defence.

As the executors cannot prefer one creditor to another, by voluntary payment, so they ought not to overlook any obvious allegation that can be made against the claims on the executory, or answers to the defences offered for the debtors to the executory: thus, if any of the debtors to the executory have, after the creditor's death, acquired right to the debts owing by the deceased, compensation will not take place

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^a B. 1. tit.
24. § 31.

place thereon against the debt due to the executory, as I observed at large elsewhere^a: and the executors ought not to omit such plea, or any just allegation that may occur against any of the debts whereon claims are founded against the executory. But, as just remarked, the executor should summon all the creditors he can discover, in a multiple-poining, and then they are bound to advert to their own interests, and he pays safely to those that are preferred, even tho' in absence; because he pays upon a lawful sentence. And persons hurt, in case they were privileged creditors, by such preference, can only recover their money from those that received it unduly, but others, tho' not called in the action, have no remedy, unless they had interpellated the executor by citation, or that he behoved to know them, as being testamentary creditors.

EVEN payment of legacies, or to the wife or nearest of kin, of their shares, upon lawful sentence, will be a good defence against creditors who had not interpellated the executor before such payment, unless the debts were consistent with his own knowledge: and the creditors must pursue the receivers for their payment; but he cannot pretend ignorance of testamentary debts; and so, in a question with them, payment of legacies is no defence.

91. Payment of legacies on a lawful sentence secures the executor.

^b P. 1693.
c. 15.

^c Feb. 6.
1627. Ker.

THE debtors of persons deceased are bound to pay to executors without a decree; for they may safely do it; and summary diligence is competent at the instance of the executor confirmed, in the same manner as at the deceased's, the confirmation of the debt being equal to a special assignation^b, which was otherwise of old. Payment, or any other defence, will not be competent to be proved by the executor's oath, farther than concerns his own interest; because, as to the overplus, he is but as a factor or trustee; nor can any creditor prove his debt in that manner to any other effect^c. And therefore, before payment of a debt, instructed only by the executor's oath, the creditor must find caution to secure the executor against other creditors who vouch their debts legally; for, by such payment, the inventory cannot be exhausted, and it is not reasonable the executor should be allowed to suffer damage in the exercise of the office.

92. Debtors to persons deceased bound to pay to the executor without sentence; what if a creditor of the deceased's instruct his debt only by the executor's oath.

^d Decem. 22.
1744. creditors of Crichton contra Mr. Charles M'Doual.

AN executor-creditor is always preferable for his own debts, after the privileged debts, which are preferred to his; and, in case of more such confirmations of the same subjects, according to their respective dates. One confirming as nearest of kin will likewise be preferred for debts owing to himself, tho' he did not confirm as executor-creditor, provided those debts were either originally due to himself, or assigned before confirmation; and will also get allowance of all debts of the deceased, paid by him on discharges before confirmation; or wherein he stood originally cautioner for the deceased, whether the same were paid by him, or not, to the creditors, at the time of his being brought to account for the executory, provided the creditors are certain, and insisting for their payment; because then it is *jus tertii* to the other creditors, whether such creditors have received actual payment from the executor, their cautioner, or not^d.

93. An executor preferable for all the debts owing to himself by the deceased, or wherein he was bound cautioner for him, or which he takes course with before confirmation.

SECTION IV. *Questions incident to Executory.*

94. A disposition of lands, for security of all sums due or to be due to the donee, renders not subsequent debts, in form of moveable bonds, heritable.

95. Bonds including executors fall to executors of the assignee, when assigned without any including clause, unless they are so assigned to the heir himself.

96. If there was an obligation, by the ancestor, to sell lands, is the price due to the executors.

97. Relief competent between the heirs and executors; the case of a personal annuity.

A DISPOSITION of lands, for security of money then lent, and of all other sums to be thereafter contracted, secures heritably all subsequent debts contracted before infestment^a; but if such posterior debts are of the nature of moveable bonds, they will fall, notwithstanding, to executors^b. And, by the same rule, where one disposes his lands, with the burthen of his debts specially mentioned, that will not hinder them from falling to the executors of the creditor, which the debtor cannot prevent; as likewise do sums eiked or added to a reversion, unless the eik was registred in the register of reversions^c.

BONDS otherwise moveable, taken "To one and his heirs and assignees, including executors," both from the nature of the thing, and express provision of the act 1661, are heritable, and fall to the heir of the creditor. But if the creditor assign such bond "To one, and his heirs and executors," it will belong to the executors of the assignee, since, in the assignation, they are not likewise excluded^d; for the bond comes to be in the same case as if it had been taken originally in those terms. If one assign such bond to another and his Heirs, without adding (executors) or including them, it would seem that the same should fall to the executors of the assignee, they not being excluded, for they are heirs in a moveable subject: and indeed, by a bond "To one and his heirs, including his executors," the creditor only substitutes his heir, strictly so called, in the room of his executors, and this substitution flies off when he assigns it; and, by the foresaid statute, such bonds fall to executors, when they are not excluded. And the act being introduced in favour of the younger children, to increase the funds of their provisions, ought to be amply interpreted for their behoof. But where such bond was assigned to the heir himself, and "his heirs and assignees," without mentioning his executors, or excluding them, the court preferred the heir of the assignee to his executor^e; but there being a peculiarity in such case, it cannot make a general rule.

HERITABLE rights being disposed by the deceased, whether by a perfected disposition or minute of sale, the price belongs to his executors, as above, where it is taken payable to the deceased, his heirs and executors. But if there was only an obligation to dispose the subjects for a certain price, so as it was in the obligee's option to insist on it or not, the price will belong to the heir of the obligor, who, by decree, is compelled to dispose; for there was no sum due to the deceased, but was only to become due on his disposing, and consequently must belong to the heir who disposes; for, till the obligee determined himself, the matter was pendent; and the case is the same, if in any other respect the contract is imperfect^f.

Tho' creditors, either in heritable or moveable obligations, have their option to pursue either heir or executor, as above mentioned, yet relief is competent to the heir for moveable debts against the executor, and to the executor against the heir for heritable debts; and they are, in questions between themselves, in the same case as if they succeeded

^a P. 1696.
c. 5.

^b Feb. 18.
1676.
Wauch.

^c Newt. de-
cif. 55.

^d Fount. June
17. 1680.
Sandilands.

^e Nov. 18.
1747. heir
and execu-
tors of Sir
John Kenne-
dy compet-
ing.

^f Arg. July
7. 1680.
Wauch.

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succeeded to different persons. Hence, if the deceased was bound to employ a sum on land, or heritable security, in favour of the heir of a marriage, the obligation is performable by the executors, being moveable in respect to the debtor, tho' heritable as to the creditor ^a. But annual duties having *tractum futuri temporis*, a respect to a tract of future time, are, in this view, deemed heritable: thus a liferent-provision of an annuity by the deceased to his wife, or other person, even without reference to lands, will affect the heir, who has no relief against the executor, tho', being a personal obligation, the creditor in it may pursue either ^b.

^a July 25.
1662. Nay-
smith. June
19. 1678.
Dickson.

^b Feb. 5.
1663. Hill.

ONE, by disposing a land-estate, with the burthen of his debts, does not thereby free his executors at law from relieving the disponee of his moveable debts; for such burthen is only intended for security of the creditors, and not to ease the executors of the debts to which the law subjects them ^c. And for the same reason, such will be the case, even where both the disposition of the heritage, and that of the moveables, are burthened with the granter's debts ^d; unless it shall appear, from the tenor of the deeds, that his intention was to burthen the one or the other preferably with the debts.

^c Jan. 23.
1745. Ruf-
fels.
^d June 12.
1747. Camp-
bels.

THE executor who is nearest of kin may sue the heir upon moveable bonds, granted to himself by the deceased, in default of executory, or moveable estate of the granter; as he may likewise for relief of moveable debts, so far as he has, thro' mistake, paid beyond the extent of the inventory; because, in that view, there is no executory as to the excess.

98. The case of relief, where the deceased had burthened his heritage and moveables with his debts.

If one succeeds as heir of provision, or as heir at law, in a land-estate, when he is not one of the nearest of kin to the ancestor, he cannot collate that estate to the executors, and thereby have an equal share of the whole; because he is none of those who can succeed in the moveable estate. But such heir unquestionably has relief against the executors for the moveable debts; and, by the same rule, the executor will have relief against him for the heritable debts, in the same manner as if he were intitled to a share of the executory, on collating the heritage.

99. The executor's action, for moveable debts due to himself, how far good against the heir.

By statute ^e, if one had an action depending against a party at the time of his decease, he may charge the nearest of kin to confirm executors to him within 20 days after the charge, which charge so executed shall be a passive title against him, unless he renounce; and in case he do, the charger may proceed to have his debt ascertained, and the *hereditas jacens* of moveables declared liable, by a decree *cognitionis causa*, and thereafter he may confirm executor-creditor to him in common form.

^e P. 1696.
c. 41.

100. Relief of moveable debts competent to the heir; or against him, as to heritable debts, tho' he be not one of the nearest of kin.

EXECUTORS are presently conveyable by creditors, or others interested in the executory; but execution will be superseded against them for a reasonable time, within which they may make the subjects in the inventory effectual; or they will be exonerated upon assigning the inventory to the pursuer, that he may, by lawful diligence, recover his payment. It would seem, from an old statute ^f, that

^f P. 1503.
c. 76.

101. The procedure against the executors of a defender dying during a dependence.

102. Executors presently conveyable, but may relieve themselves, by assigning the inventory to the pursuer.

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that the heir cannot pursue the executor, for relief of moveable debts, till a year after the ancestor's death expire, but, which at present does not take place; for, if the executor has recovered sufficient effects for satisfying the debts, he will be presently answerable.

103. The nearest of kin preferable in the office of executory to creditors, or a general disponent.

THERE sometimes happens a competition concerning the office of executor, where there is no nomination between the nearest of kin, and a general disponent. But, for answer, one that has a general disposition is only confirmed as creditor upon the warrandice in the disposition, expressed or implied, and must therefore yield the office to the nearest of kin competing for it, since, by the instructions to the commissars, *anno* 1666, the nearest of kin are expressly preferable to creditors. And indeed, from the nature of the thing, the succession in moveables devolves on them, unless they are excluded by the deceased, which can only be done by a nomination of executors. And accordingly the court of session preferred the nearest of kin to the relict, tho' she had likewise a general disposition from the deceased to his moveables, whereby the executor would be accountable to her for the produce of the executory ^a.

^a Jan. 27.
1708. Scot.

104. The relict preferable in the office to creditors, but they to legataries.

BY the same instructions, in default of the nearest of kin, the creditors, as they apply, are preferable; and, if they do not insist for the office, the legataries will be confirmed. But there is no mention of the relict, tho', at the same time, considering her interest, she may well be supposed preferable, failing the nearest of kin: and the act 1690 plainly prefers her to the creditors.

105. An universal legatary preferable to particular legatees in the confirmation.

I HAVE already observed that a general disponent, who is intitled to confirm upon the warrandice in the disposition, express or implied, will be preferable to a particular creditor insisting to be confirmed; and, by the same rule, an universal legatary, having the management committed to him by the deceased, ought to carry the office in preference to particular legatees for sums of money.

106. How far executors intitled to expences of diligence.

THE expences either of pursuit or defence will be sustained to the executor in his exoneration; because he cannot safely pay, for most part, without decree, as above; but, since the debtors are bound to pay to him without it, he ought, in the action against them, to insist for expences, which, no doubt, will be granted, if they had no probable ground of defence. But if, in such case, expence is denied, or the full costs not given, he will be allowed the same, or the residue, in his accounts. And, because the executor is acting in pursuance of his office, it does not alter the case that the cause was lost, if the suit was commenced by the deceased, or there was probable ground for it ^b.

^b Dirlet. dec.
cif. 181.

107. Executors liable to diligence for the contents of the inventory, but not for things omitted.

EXCUTORS are all equally liable in diligence. Creditors who confirm more than satisfies their own debts, have themselves to blame, for they needed not have done it; and executors strangers nominate ought to abstain from the office, if they suspect the subject is exhausted by debts or legacies; but their accepting cannot be prejudicial to others interested in the executory, and the nature of the office requires diligence. However, it is in the executor's option what

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what subjects he shall confirm, for he is only liable in diligence for the contents of the inventory, and what he intermeddles with beyond the same^a. He is not bound to confirm debts, which he suspects to be desperate or uncertain; but may, if he pleases, sue for them, on a licence, as was already observed.

^a Decem. 18.
1744. Dun.

THE diligence required from all executors, is according to the circumstances of the debtor, by affecting his lands or moveable estate, for payment of the debts due to the executory. But, if he had neither lands nor goods, and was insolvent at the time of the confirmation, it is a good defence; but the presumption lies for solvency, unless the executor show a registred horning against him. If, by fatality, the goods of the executory perish, before they could be reasonably disposed of, the executor must have allowance of the same. He being only a trustee, in respect to others interested, cannot traffick with the effects of the deceased, at the risque of the executory; but may, and ought to perfect a negotiation begun by him.

108. To what diligence are executors bound; they cannot traffick with the effects.

WHEN one of the nearest of kin is confirming, others in the same degree may be conjoined with him, they having all equal interest; unless the others have renounced, by acceptance of sums in satisfaction of their legitim, and other interest in the succession; in which case the whole executory and office accrues to those that have not renounced, as is above observed. And it has been likewise already mentioned, that other creditors may be conjoined with any of them that offers to confirm.

109. If one of the nearest of kin, or a creditor, is confirming, the rest equally interested may be conjoined.

IF the heir is also nearest of kin, and no other in the same degree, he is both heir and executor, and has right to a legitim, or bairn's part, in a question with the relict, without collating the heritage. But, if there are divers persons in the same degree of relation, as several children, the eldest son is heir, and the rest executors; but the heir may collate the heritage to the rest, and be admitted equal sharer with them in the whole succession, as above. Under this collation or contribution, fall not only the heirship-moveable, but likewise all heritable subjects, whether the heir succeeds therein by service; or, being *alioqui successurus*, had right to the same, by a gratuitous disposition, from the deceased; for still such subjects are considered as part of the heritage, and therefore the deed of conveyance is termed *Præceptio hæreditatis*^b.

110. The heir claiming a share of the executory, must collate the heritage.

^b July 26.
1678. Murray.
July 23.
1678. idem.

^c Hume decif.
20.

^d Sup. tit. 5.

BUT if, in the case of daughters, the land-estate is tailed to the eldest, either by the deceased, or his ancestors, she may notwithstanding, without being obliged to collate, as one of the executors, draw equally with the rest^c; unless the intention of the father appear to be, that she should impute the same, as I observed elsewhere^d; because all the heirs-portioners are equally vested with the character of heirs and executors; and therefore, whatever any of them takes of the heritage, by the deceased's settlement, cannot divest her of her character of executor. Whereas, in case of an heir and executors, the heir, in his own right, has no title to the executory; unless he claim as one of the nearest of kin, which obliges him to renounce his character as heir, and to collate the heritage.

111. An heir-portioner, getting part of the estate by settlement, not bound to collate it.

112. Nor is any of the younger children bound to collate lands.

AND, tho' one of the younger children has obtained from the deceased a disposition of lands, he may claim his share of the executory without collating^a. It is otherwise, where the disponent was *alioqui successurus* in the land-estate, for then he is understood to have it as heir *præceptione hæreditatis*, and must collate it, if he insist for a share of the executory, as just said; but any other interested in the executory, in his own proper right, need not collate the heritable subject, which he has by a singular title.

^a July 16. 1678. Mur- rays.

113. The case of an heir confirming, for his relief of moveable debts; and of a cautioner for his relief before payment.

THE heir is properly creditor to the executory for his relief of moveable debts, and therefore may confirm upon the late statute^b, as if he were creditor to the ancestor; but, no doubt, all creditors of the deceased are preferable to him, since he is liable to them as heir. Those who were only confirmed executors-creditors to the deceased, for relief of cautionry, will only be preferred to other creditors there-after confirming, in case they made payment before confirmation, at least before the competition, unless those to whom they are bound, are insisting, because 'tis otherwise uncertain, if ever they shall be actual creditors; and the diligence of the rest must not be delayed^c. And, for the same reason, creditors for relief will not be conjoined with another creditor in a present debt, offering to confirm; unless they have made payment of the debt, before such application, or the creditors to whom they are cautioners concur in it; and this is a natural inference, from what was found in the case of the creditors of Charles M'Doual, above referred to.

^b P. 1695. c. 41.

^c Spotf. (executors) Smith. Feb. 2. 1628.

114. What if one is erroneously confirmed as nearest of kin, when there is a nearer.

IF one is wrongfully confirmed executor, as nearest of kin, when there is a nearer, his title cannot be objected to by the debtors to the deceased, being *jus tertii* to them^d; and can only be challenged by reduction, at the instance of the party interested, as truly nearest of kin, who may either oblige him to denude or reduce his confirmation, and apply for confirming himself, or allow him to execute the testament, and be answerable, as accords, as I took notice above.

^d Decem. 6. 1709. Hamilton.

115. Sometimes an executor cannot safely pay, even on sentence, extraneous creditors.

AN executor is not safe in paying extraneous creditors upon lawful sentences, if there be testamentary creditors, or such whom he has acknowledged, by payment of interest, or otherwise; for he ought to suspend, and call in a multiple-pounding those others, in prejudice of whom he cannot *bona fide* make payment, more than if they had used citation before payment^e.

^e Spotf. (executors) Telfer. id. Duff.

116. Titles made up in foreign parts, conform to their law, not good here.

TITLES made up in England, or elsewhere, in the person of such as might succeed, conform to the custom of the country, but disconform to our law, will not be sustained to carry either heritage or executory, which must go to the heirs at law, and nearest of kin here, and by titles of service and confirmation, as is above, and elsewhere observed^f.

^f B. I. tit. 1. § 82. 83. Decem. 9. 1623. Henderson. Dirlet. decis. 21.

117. Who the competent commissar for confirming one's testament.

IF the confirmation is not expedited before the proper commissar, it is null, as *a non suo judice*, and others regularly confirming will be preferred. The competent commissar is, where the deceased had his residence: and as to soldiers, if the regiment to which they belonged did remain 40 days in the place where they die, the commissar

^a Feb. 16.
1711. Nis-
bet.

^b Feb. 13.
1711. Nis-
bet.

^c P. 1669.
c. 17.

^d Instruct. to
the commif-
far, 1666.

^e Jan. 23.
1745. credi-
tors of Mur-
ray.

^f P. 1690.
c. 26.

^g July 1743.
M'Whir-
ter.

^h Feb. 20.
1751. Spence.
against the
creditors of
Alcorn.

missar there is competent to confirm their testament, but otherwise the commissars of Edinburgh^a. And as to those who die abroad, having their residence likewise there, or having no residence at all, the commissars of Edinburgh ought to confirm their testaments; but otherwise, tho' they die abroad, or at Edinburgh, where they were occasionally about their affairs, the commissar of the place where they resided is only competent to confirm their testament^b.

OF old, all the effects of persons deceased behoved to be confirmed, and the nearest of kin might have been charged with horning, and taken with caption, if they did not confirm^c. This diligence was carried on against them at the instance of the fiscal of the commissariat within which the deceased resided at the time of his death, or of the commissars of Edinburgh, if he lived abroad at such period. In case the nearest of kin refused or neglected to confirm, then the commissary might confirm his own fiscal^d. If confirmation was not expedited in the lifetime of the nearest of kin, he did not transmit the subjects unconfirmed to his own nearest of kin, but the same went to the next of kin of the first deceased, as *in bonis* of him; but now, a partial confirmation of one, as nearest of kin, has the effect of transmitting the whole executory to his own nearest of kin, and which is effectable by his creditors^e. These charges, at the fiscal's instance, compelling people to confirm, were a great grievance, and therefore the same are discharged by special statute, and none can confirm but the nearest of kin, relict, creditors, or legataries^f, and they may do it or not, as they see cause.

IN consequence of the provision of this statute, the lords of session lately found, that the nearest of kin of persons deceased, attaining possession, do thereby transmit the right of the moveable goods that belonged to the deceased, without any confirmation^g; so that, after such possession attained, the next nearest of kin is absolutely excluded, in the same manner as if the nearest of kin deceased, who attained possession, had been confirmed. This will not save the nearest of kin, who took possession without confirming, from being liable in the passive title of vitious intromission; but prevents great expence to the lieges, and likewise gives them security in their transactions, it being most ordinary, among people of low life in the country, to divide the effects of deceased relations, according to their several interests, without any thoughts of confirming the same.

By the same rule, if the nearest of kin receive payment from the debtor to the deceased, and deliver up the bond, or get him to renew it to himself, or to ratify the same by a bond of corroboration, he needs no confirmation; for the right to the debt is thereby fully vested in his person. Thus one, upon a suit on a decree-dative, and licence to pursue in his favour, as next of kin to the deceased, obtained a bond of corroboration during the dependence, and thereon, without confirming, took decree against the heir on the passive titles, and, on that decree, adjudged upon a special charge. After his death, without confirming, an inhibition on the depending action, and adjudication upon the decree, were sustained, even in competition with other adjudgers^h. But if the nearest of kin die before confir-

118. The procedure by the commissars of old, and the rule now by the act 1690.

119. The nearest of kin obtaining possession of the goods of persons deceased, need not confirm, but may be subjected as vitious intromitters, if they do not.

120. The next of kin may take payment, or transact with debtors; the consequence of it.

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mation, or without possession of the moveables, or such transaction with the debtors, their interest evanishes. The security of creditors seems to be impaired by this alteration of our law, pursuant to the statute 1690, above referred to, the necessity of confirmation, and caution therein found, being thereby superceded; but, since people cannot be compelled to confirm, their transactions without it, touching the executory, ought to stand good. The creditors however, by offering to confirm executors-creditors, may prevent such transactions, or oblige the nearest of kin to confirm; but otherwise, their only course is to sue such on the passive title of vitious intromission, which the act 1690, and those judgments thereon, do not secure them against.

Observations on the Law of England, in relation to the Premises.

1. A testament; if no executor is named, an administration granted with the will annexed.

A TESTAMENT is "The disposition of what one would have to be done after his death, concerning his goods and chattels, with the appointment of an executor." If he appoints no executor in his will, the ordinary must commit the administration, with the will annexed, and such administrator is to perform the will instead of an executor^a. And with us, in such case, the legataries, to make good their legacies, may confirm executors-legatees, if the next of kin do not confirm themselves executors to the deceased.

^a West. symb. 633.

2. It is either a testament in writing, or nuncupative; if wrote by the testator, it is good without subscribing; it needs not be sealed.

FROM the nature of the thing, a testament is either Written or Nuncupative. A Written Testament is "that which, at the time of making it, is committed to writing," and if it is wrote with the testator's own hand, and begins with his name, it is good, tho' it is neither signed nor sealed; for it is no matter whether the signing be at top or bottom. Sealing is not necessary, but if there is a sealing, it is a signing too^b. A testament would not be good by our law, tho' it were all wrote by the testator, unless he signs it too; for, without signing, we account a testament incomplete, and void, in the same manner as a deed unsigned.

^b 1. Danv. abr. (devise) 541.

3. A codicil; every will where an executor is not named; one may leave divers codicils, but only one testament; the new publication of the first testament revives it.

A CODICIL generally is suppletory to a will or testament, adding what is omitted, altering, retracting, or explaining something in it. But there may be a codicil, where there is no testament, viz. a last will, without the appointment of an executor, the only difference between a testament and codicil being the nomination of an executor, without which the will is only a codicil, and, in such case, the administrator must pay the legacies. The testament likewise resolves into a codicil, if the executor does not accept^c. One may leave behind him as many codicils as he pleases, but can leave only one testament; the last testament only shall stand, the rest being either by implication, or expressly revoked thereby. But as all testaments require publication before the witnesses, a new publication of the first will shall make it to subsist, and revoke the last that was made^d. In those particulars our law agrees, except that a new publication of the first will would not revive it, or infer a revocation of the last; for that were to allow the validity of a written testament to depend upon the witnesses, which were in effect to turn it into the case of a nuncupative will.

^c West. symb. part I. § 639.

^d Perk, 479.

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^a 29 Cha. II.
c. 3.

IN England it is ordained by statute ^a, "That no will in writing, concerning goods and chattels, nor any clause thereof, shall be repealed or altered by any will by word of mouth only; except the same be in the lifetime of the testator committed to writing, and read to the testator, and allowed by him, and proved to be done by three witnesses." This would not alter or invalidate the will by our law, unless such writing that revokes the testament were duly subscribed, as above.

4. How a will in writing repealed by word.

^b Ibid.

A NUNCUPATIVE testament, or will, is, when the testator, by word of mouth only, declares his will concerning his goods and chattels, (for lands cannot pass by such will) before a sufficient number of witnesses. And by the above quoted statute ^b, no nuncupative will shall be good where the estate bequeathed exceeds 30 pounds, that is not proved by the oath of three witnesses at least, that were present at the making thereof, and some of them desired by the testator to bear witness. Nor shall a nuncupative will be proved after six months, except the substance thereof were committed to writing within six days after the making the same. Nor shall any probate of a nuncupative will pass till 14 days after the death of the testator, to which likewise the widow, or next of kin to the testator, must be called to contest the same, if they please. This circumspection, in admitting nuncupative wills, demonstrates the apprehension the legislature had of danger from them. And for the same reason our law has limited them to sums not exceeding one hundred pounds Scots, or eight pounds six shillings and eight pence Sterling.

5. A nuncupative will; the solemnities requisite to it; no lands can pass by such will.

^c Tit. inst. de milit. testam.

SOLDIERS in actual military service, and marines at sea, are excepted from this act. As soldiers in actual service had the privilege, by the civil law ^c, of making their testaments verbally, or any other way whereby their will could be known, it would seem reasonable, that an indulgence should be granted to them, and likewise to seamen in the sea service, but which has not been cleared by any precedent in the court of session that I know: however, in cases where our own law has not fixed another rule, we, for most part, follow the civil law, especially in testamentary matters.

6. Soldiers, in actual service, not liable to the ordinary solemnities in making wills.

^d Swinb. part II. § 3.

AN infant male, of the age of 14 years, and a female of 12, may make a testament without the authority of curators or guardians. Idiots, lunatics, (except in their lucid intervals) one *non compos mentis*, or not having a sound and disposing memory, cannot make a testament, all which is settled by the law of England ^d, and holds with us likewise. However, in this there is a diversity between the one law and the other, that a woman-covert cannot make a testament in England, even as to her goods and chattels, (other than of such as she has as executrix) without her husband's licence; whereas, by our law, she can make a testament without her husband's consent, as a minor may without his curators.

7. Who capable to make a testament; a married woman cannot, without her husband's licence.

^e Perk, 501.

AN executor is "A person appointed by the testator to execute his will after his death," and may be appointed by word of mouth, in the above manner, by the law of England. Without an executor, properly speaking, there is no will; for, as to a devise of lands, VOL. II.

8. An executor; who capable of the office; the wife cannot officiate

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without the husband's consent; the case of a pupil named executor; all of them considered as one executor.

(whereof afterwards) which may be without appointing an executor, it was not originally competent. All that are capable of making a testament may be executors; and as husband and wife are considered as one person, and as having but one mind, which is deemed in the husband as most capable, a wife cannot take upon her the office of executorship, without the consent of her husband^a. But there are some that may be executors that cannot make a testament, as pupils; and, in such case, the ordinary must grant letters of administration, *durante minoritate*, or till they are at least 17 years of age. There may be one or more executors, but all of them, in the eye of the law, are but one executor, and, in that respect, most acts done by, or to any one of them, are understood as acts by or to all^b, whether such acts relate to the gift, sale, delivery, payment, possession, or release of the testator's goods; for they have a joint and entire authority over the whole^c.

^a Bac. new abr. (executors) 378.

^b West. symb. part I. § 635.

^c Bac. new abr. (executors) 395.

9. How far an executor charged with the fraud or negligence of his companion.

BUT an executor shall not be charged with the wrong, fraud or negligence of his companion, and regularly shall be no farther liable than for the assets that come to his hand. But it hath been held in chancery, that if two executors join in one receipt, and one of them receives the whole money, each is liable for the whole, as to creditors, who are to have the utmost benefit of law; but, as to legatees, only the receiver^d.

^d Bac. ibid. 395.

10. An executor regularly intitled to the whole residue of the effects.

THE very naming one executor, generally is a disposition to him of all the testator's personal estate, the overplus of which, after he has executed his trust, belongs to himself, as a recompence for his labour and trouble. But, in several instances, in the case of strangers being named executors, if the testator gives them legacies, it hath been adjudged by the court of chancery, that they are only trustees for the next of kin, and they have been decreed to make distribution of the overplus accordingly^e.

^e Bac. ibid. 423.

11. One may accept or refuse an executorship, but if he once do either, he cannot afterwards retract; whence is acceptance inferred.

ONE may accept or refuse an executorship, but, after he has once refused the office, he can never after intermeddle; nor, if he once legally accept, can he ever after refuse it. Every intermeddling with the goods of the deceased will not infer an acceptance, to make one chargeable as executor: thus, acts of necessity, for preserving the subjects, or of charity and humanity, as burying the deceased, and selling goods to answer the expence, will not amount to an acceptance of the executorship^f. With us, where an infant, minor, or pupil, is named an executor, or has title to the office as next of kin, his tutor or curator, or, if he has none, some near relation is the up-giver of the inventory, and has the administration of the effects, and gives security to be accountable to the minor, and all others concerned, for the contents of the inventory. The regular acceptance, by an executor nominate, is by confirming or intermeddling with the deceased's effects, in pursuance of his office.

^f Coke 9. rep. 37.

12. One may freely, by the common law, dispose of all his goods and chattels,

By the common law of England, one may, in testament, dispose of all his goods and chattels, (with the burthen of his funeral expences and debts) and his wife or children can claim no more thereof than as he shall bequeath to them by his testament; so that every man

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^a Bract. lib. 2.
26. Swinb.
part 3. § 16.

man has the free disposal of his moveables by testament, and is not bound, by any obligation lying upon him from the law, to give any share of them to his wife or children^a; which is otherwise by our law, as is set forth largely in the foregoing title.

by testament, without regard to his wife or children.

^b 11 Geo. I.
c. 18.

^c Swinb. ubi
supra.

^d Swinb.
part 3. § 18.

BUT there is a custom in the province of York, and other places in England, whereby, if one has a wife and children, (besides the heir) not advanced, or provided by him with competent portions in his life, he could only (before the late statute enabling every person to dispose of his effects at pleasure^b) bequeath by testament the third part of his moveables, called the Dead's Part, which is at the testator's free disposing; and the wife is to have a third, and the child or children the other third, called the Filial Portion. But, if the children are provided, or there be none but the heir, then his goods are divided in two parts, whereof the wife has the one half, and the other half remains to be disposed by the testator^c. Our law agrees in the main with this custom; but, in some particulars, it varies from the same, in as much as the heir has not liberty to collate, or bring into hotch-pot the heritage, tho' ever so small, in order to draw an equal share of the whole subjects of the succession with the other children; nor could a child, who had got a competent provision, tho' far short of his share of the filial portion, be intitled to the same, upon bringing into contribution what he had received^d. Both which is otherwise by our law.

13. By the custom of York, and other places, one could only dispose of the dead's part, the quota of it the same, as by the law of Scotland.

^e Bac. new
abr. (customs
of London)
684.
^f 11 Geo. I.
c. 18.

THE custom of London, as it formerly was before the late statute above referred to, had a nearer resemblance to our law in this point, and there was almost a perfect congruity between them; for a citizen of London dying intestate, who leaves a wife and children, one third of his personal estate belongs to his widow, as her customary share, and another third to the children, called their Orphanage-part, as to either of which he could not, by his will, prejudice them; and the other third is called the Dead Man's Part, which was at his free disposal; and, in default of making a will, touching this last, it went according to the provision of law, by the statute of distribution. And, if he had a wife and no children, or children and no wife at the time of his death, the one moiety of his personal estate was theirs, and the other moiety the dead man's part, under the same regulation. This is said to be the remains of the common law, but that it being found extremely inconvenient and hard, the same, by the tacit consent of the whole nation, grew into disuse; only that, in the city of London, the mayor and aldermen having the care of orphans, by their power and authority, retained it there, tho' disproved elsewhere^e.

14. The custom of London, as to the widow's customary share, and the orphanage part.

BUT now, by the late statute^f, any freeman of London may, by will, dispose of his whole personal estate at pleasure; unless it hath been agreed by any writing, in consideration of marriage, that his personal estate shall be subject to the custom. But still, if he dies intestate, his personal estate shall be subject to, and distributed according to the custom aforesaid.

15. This custom abolished by statute, as to the denial of a power of disposal of one's whole personal estate.

IF

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16. The child may bring in to hotch-pot what he receives on his marriage, and draw his full orphanage share.

If a freeman's child be married in his father's lifetime, and get a provision, he may bring the same (if he pleases) into hotch-pot with the other children, and have as much as will make up the same a full child's part or portion of the personal estate that their father had at the time of his death. But a portion is only to be brought into hotch-pot with the orphanage part; and therefore, if there be only one child who has got such portion, he retains it, and draws his orphanage part besides. Nor is a settlement of a real estate to be brought into hotch-pot; and a grandchild has no title to an orphanage share^a. All which is precisely conform to our law.

^a Bac. *ibid.*
685. 686.

17. If a woman, upon her marriage, accepts of a settlement from her husband, she regularly has no claim to a customary share.

If a woman, upon her marriage, accepts of a settlement out of the freeman's personal estate, such Compounding (as it is called) shall bar her of her customary share; but, if the husband dies intestate, she shall have such part of the dead man's share, as she is intitled to under the statute of distribution: but a jointure out of lands will only bar the wife of her dower, or third of lands, but not of the customary share of her husband's personal estate^b. This, in the main, holds in our law, only a provision out of moveables to a wife, in her contract of marriage, will not exclude her from her legal share of the remainder of his personal estate, unless it is given her in satisfaction of the same.

^b Bac. *ibid.*
p. 687.

As to the hardships, on account of which this part of the common law is said to have gone into disuse in other parts of England, in respect to disabling people from prejudicing, by their wills, their wives and children of their legal shares, we find no inconveniency by such regulation. Our law introduced a restraint of that kind, for the same reason that it bars one from such acts, in prejudice of his heir, on death-bed, whereby his land-estate might be affected; namely, that persons in that condition are liable to be imposed on, and easily prevailed with, by designing people, to do things, in relation to their personal and real estates, to the prejudice of their wives, children and heirs, which they would not have agreed to in perfect health. So that both these are salutary laws, owing their original to our ancient law-books of *Regiam Majestatem*, and whereof there is a parallel in the civil law, which disabled persons to prejudice their children of their legitim, by testament, as above.

18. The interest of executors; they have right to mortgages.

AN executor, by the law of England, hath right not only to all the chattels real and personal, but likewise to those things that lie in action, as rights and interests upon judgments, statutes, recognizances, and all other debts due to the testator, tho' upon mortgage; and, for this reason, the executor is said to represent the testator^c.

^c Coke 1.
inst. 209.
2 Vent. 358.

19. Corns and industrial fruits belong to the executors; but natural fruits and roots, as likewise fish in a pond, or pigeons in

CORNS, tho' growing at the time of the deceased's death, as also every thing else of that kind that is produced annually by labour and cultivation, belong to the executor, and not to the heir, as hops, saffron, hemp, &c. But natural fruits, as grass, and likewise roots of all kinds; as parsnips, turnips, &c. belong to the heir, for these cannot be come at without digging the earth, which necessarily must be a spoil and injury to the inheritance. So, deer in a park, fish in a pond, and doves in a dove-house, together with the park, pond, and pigeon-

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pigeon-house, descend to the heir. And as trees, unless severed or cut down, belong to the heir, so does the fruit which they bear, as apples, &c. and grafs growing, tho' fit to be mowed down for hay, shall likewise descend to the heir^a. This is the rule which we likewise follow.

^a A pigeon-house, belong to the heir.

^a Coke 1. inst. 8. Bac. new abr. (executors) 421.

^b 21 H. VIII. c. 5.

^c Swinb. part 3. § 16.

^d Bac. new abr. (executors) 377.

^e Bac. ibid. 407.

THE duty of an executor, is, 1. To bury the testator in a decent manner. 2. He ought to make an inventory of all the goods and chattels, in terms of the statute in that behalf^b, and to prove the will before the ordinary. This probate of the will intitles him to bring actions against the debtors to the deceased, and possessors of his effects, and confirms the acts which he did as executor before the probate. 3. It is his office and duty to pay debts and legacies; and debts ought to be paid before legacies; for, if he shall pay legacies, and there is not sufficient assets, *i. e.* executory effects after such payment of legacies, he must pay the debt out of his own estate^c.

²⁰ The duty of executors; they must make an inventory, &c.

As executors, in many cases, are considered as bare trustees in equity; so, if they be insolvent, the court of chancery will oblige them to give security, before they enter upon the management, as they would any other trustee^d. But otherwise an executor is not bound to find surety, for making good to the creditors or legatees the contents of the inventory, which he is compellable to bring in, within such time as the ordinary shall appoint; and, if he fail, he is punishable in the spiritual court^e. In most of these points our law is the same; for a confirmation of the executor by the commissars is similar to a probate of the will, and proceeds upon an inventory. But, by our law, an executor, before he is confirmed, must always find caution to make good the contents of the inventory to those interested in the executory, *viz.* creditors, legatees, the wife, children, or other next of kin of the deceased: which executors regularly are not bound to do in England.

²¹ An executor regularly not bound to find security for the contents of the inventory, but on occasion is subjected to it.

^f Office of ex-ecut. c. 12. ^g 9 Annæ, c. 10. ^h 6 Annæ, c. 26.

ⁱ Coke 4. rep. 60.

IN payment of debts, this order must be observed by the law of England: 1. After the charge of the funerals, inventory and probate, the king is to be preferred for his debts due upon record or specialty^f. 2. Money due for letters to the post-office^g; this last statute is general, and therefore extends to this country: and, as to the preference of debts due to the king, the law of England is made ours^h. 3. Debts due to private persons, upon judgments against the testator in any court of record, without any consideration of first or last, but he that sues first execution is preferred; and otherwise, it is at the election of the executor to pay whom he will, of those of the same degree. 4. Statutes or recognizances; and the executor may likewise in those give preference to whom he pleases before executionⁱ. 5. Debts due for arrearages of rent upon leases, &c. in writing, and debts due upon specialties. And, lastly, Debts due upon bills or notes not sealed, and shop-debts, or due by verbal contract, for there is no difference between any of these. But, tho' the law requires, that debts should be paid according to their superiority, yet an executor may pay a debt by simple contract before a specialty, if he hath no notice of such specialty. Among debts of equal degree, the executor may always pay himself first, and thereafter the creditor in an equal

²² The order in payment of debts: an executor may prefer himself to those of equal degree.

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degree, who first obtains judgment, is to be paid first, and those debts that are due must be paid before those whose day of payment is to come^a. But executors sometimes confess judgment presently to a friend for his debt, (for he is not bound to stand suit) and plead dilators to a stranger's debt, that his friend may be first paid upon execution. If no suit is begun, the executor may make voluntary payment to any one creditor in equal degree, tho' he hath no assets, *i. e.* effects or chattels, left to pay the rest^b.

^a Office of
exec. *ibid.*

^b Office of
exec. *ibid.*

23. The
goods of the
deceased only
affectable by
his debts.

WHERE an executor pleads *riens enter mains*, or denies that he has assets, and it is found against him, nothing shall be put in execution against him, but the goods of the deceased, for 'tis not his own debt^c. It is otherwise in the case of an executor of his own wrong, as shall appear in the next title.

^c *Ibid.* 241.

As there is a considerable diversity between the law of England and ours, in the case of heirs, as I have already observed, so there is a little variation in this last mentioned point, touching an executor; for, if it be proved upon him, that he has fraudulently intermeddled with more of the deceased's effects than is contained in the inventories of the confirmation, he will be universally subjected to the debt; and, as to the order of payment of debts, there is likewise a variation, as appears from the foregoing title.

24. Execu-
tors defen-
dants pay
costs, or are
subjected
thereto; but
when plain-
tiffs, they
never pay
costs.

By the law of England, an executor defendant pays costs in all cases, and the judgment is *De bonis testatoris; et si non, tunc de bonis propriis*: also, where he is a defendant, he shall have costs, where judgment is given for him^d. But where executors are plaintiffs, they pay no costs, for they sue *en autre droit*, in the right of the ancestor, and are but trustees for the creditors, and presumed not to be sufficiently connusant, or knowing, in the personal contracts of those whom they represent; but, if they bring an action for things happening to the goods of the person deceased, in their own right, as for a conversion or trespass in their own time, they shall pay costs, but not if the goods were taken and converted, before they came into the hands of the executor, for such were never assets^e. The fair and regular method for an executor, by the practice of the law of Scotland, is to bring all the creditors into the field, by an action, which we call a Multiple-pounding, therein to dispute their respective interests, and draw their proportions, as they shall be classed.

^d Bac. (costs)
517.

^e Bac. *ibid.*

25. The
power and
duty of over-
seers named
in a will.

If one names overseers in his will, they have no power to execute it, or intermeddle with the goods, but may only give their advice; and, if the executors malverse in their duty, the overseers may complain of them in the proper court. When the executor is guilty of negligence or fraud in the management of the goods, it is a *devastavit* or waste, and he shall be answerable for the same^f. Our law is the same in this respect.

^f Office of
exec. c. 13.

26. The pro-
bate of a will
not subject
to the cogni-
zance of the

WHERE a probate of a will, under the seal of the ordinary, is shown, the temporal courts can make no judgment concerning the will, contrary to the probate: nor can they prohibit the ecclesiastical courts in their inquiries touching wills; as, whether the testator was

non

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^a Cases in equity in the exchequer, printed 1742. Bennet's case.

non compos, or whether the will was revoked or not; because it is necessary for authenticating the will ^a. Our commissary courts, before whom the confirmation of a testament is expedited, have no such power; for the proceedings before them are subject to review before the court of session.

temporal courts.

^b Perk. 57.

^c Coke 1. rep. 51.

In legacies, by the law of England, the assent of the executor must be obtained before they can be taken, even tho' they are Specific legacies, (we call them Special legacies) or some particular thing given in legacy; because debts must be paid before legacies; and therefore the executor must have time to enquire into the value of the goods, and state of the debts, that he may safely pay legacies; and, by his assent only, the property is vested in the legatee ^b. But the executor's assent is not necessary in a devise of lands. For recovery of a bond left in way of legacy, the legatee must have a letter of attorney to sue in the executor's name. If the legatee die before the testator, the legacy is lost; but if he survives the testator, tho' he die before the term of payment, the legacy is good ^c.

27. In legacies the assent of the executor requisite, but not in a devise of lands; legacies become effectual regularly by the testator's death.

^d Office of execut. c. 14.

AFTER all the debts are paid, the executor must pay legacies. If a legacy is left Generally, and no time ascertained for the payment, the executor shall have till the expiration of the first year after the testator's death, for payment of the same: for the statute of distribution allows that time, before distribution is compellable, and interest is only due from the demand thereafter. The executor must pay each legatee a proportion, in case of deficiency of funds; for the case of legatees is different from that of debts: he may not know the extent of the debts, and therefore is allowed to pay those of the same kind which come to his knowledge first; but the legacies are all known as soon as the testament is read ^d. This method is the rule which executors must follow with us; for they have no election to prefer any legatee to another, as neither have they any privilege as to legacies left to themselves, unless, by the terms of the bequest, it has a preference.

28. Legacies ought only to be paid after debts; interest due on them from demand, year and day after the testator's death.

^e Bac. new abr. (executors) 434.

LEGACIES are properly recoverable in the spiritual court; but if an executor pays legacies before debts, it is a *devastavit* in him. If the court go about to compel an executor to pay legacies, without security to refund, in case of debts appearing, a prohibition lies; and it is for this reason that the legatee cannot intermeddle with the legacy without assent of the executor ^e.

29. Where legacies recoverable. The executor may insist for security in the event of debts appearing.

^f Swinb. 528.

^g 2. Vern. 116.

IF a legacy be given to one person, and afterwards, in the same will, the same thing is given to another person, there is no ademption of the legacy as to the first person; for the utmost constancy shall be presumed in the testator till the contrary appear; and therefore, in this case, they shall divide the legacy between them ^f. Tho' a legacy becomes lapsed by the legatee's dying in the lifetime of the testator, yet if there is a limitation over to another, it is good to him notwithstanding, tho' the original legatee die before the testator ^g.

30. What if a legacy be given to one, and afterwards to another in the same will. When do legacies lapse by the legatee's predecease.

A SPECIFIC legacy is "a bequest of a particular thing or bond," and differs from a pecuniary legacy, or of a sum of money generally, in this, that

31. A specific legacy; it suffers no

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abatement
with the o-
ther legacies.

that such legacy is not, in case of deficiency of assets, to abate in proportion, as pecuniary legacies must do. And if it is taken in execution for debts, on a judgment obtained by creditors, (as it may) the legatee shall have recompence, in equity, against the executors, or residuary legatee for the value, who are to have nothing, till after the debts and legacies are paid ^a. And if it is evicted, the specific legatee can have no satisfaction out of the overplus ^b.

^a Bac. new
abr. (legacy)
482.
^b 2. Vern.
111.

32. The executor may insist to cause legatees find security to refund, in case of debts emerging. The remedy of creditors, where the assets are exhausted by payment of legacies.

SINCE pecuniary legatees must abate in proportion to the deficiency of assets, and since legacies are only due after payment of debts, therefore, tho' an executor may pay a legacy without caution or security, in case of debts thereafter appearing, yet he is not compellable to do it without such security, as above hinted. And the creditors may oblige legatees, in equity, to refund, where assets become deficient, tho' there was no provision to that purpose at the time the legacies were paid. As likewise a legatee, who has not got payment of his legacy, may compel a pecuniary legatee, who has received full payment, to refund proportionably, where the assets fall short: but he has still remedy also against the executor to force him to pay such proportion out of his own pocket, if he voluntarily paid away the assets to the other legatees ^c.

^c Bac. ibid.

33. If legacies are paid without such security, the executors relieved in equity.

BUT if the executor pay out the assets in legacies, and afterwards debts appear of which he had no notice at the time; or if he had been compelled, by a decree in equity, to pay legacies, he may, by bill in equity, compel the legatees to refund, upon his being distressed for debts thereafter, tho' he took no caution or security for that purpose ^d.

^d 1. Chand.
136. Bac.
285.

34. A residuary legatee; he is intitled to administer with the will annexed, if the executors renounce.

AN executor, by the bare appointment of him, regularly, has a disposition of all the testator's personal estate, as hath been observed. But if the testator appoints, that, after debts and legacies paid, another shall have the overplus, he is residuary legatee, and may recover such surplus or residue: and, upon the executor's refusal to prove the will, he is intitled, from his interest therein, to administration with the will annexed. And tho' he should die, before the debts and legacies are satisfied, yet his executor or administrator shall have the overplus, and not the executor of the first testator ^e.

^e Bac. ibid.
484.

35. How far executors compellable to plead the statute of limitation.

If several of the creditors are barred by the statute of limitation, who, notwithstanding, bring actions against the executor, and he refuses to plead the statute, yet equity will not compel the same in favour of the residuary legatee, to whom the surplus is devised ^f.

^f Bac. ibid.

36. A legacy to an infant, or feme covert, to whom payable; from what time do legacies bear interest.

THE executor, without a decree or order of court, cannot pay an infant's legacy to his father, or other his near relations, and, if he do, he may be compelled to pay it over again, if the same is not made good to the infant. A legacy to a feme-covert, or wife, must be paid to the husband, even tho' she be separated *a mensa et thoro*, unless it be given in trust for her separate use ^g. A year's time is given to the executor, after the testator's death, to pay legacies, and they bear interest on demand, after the year, as above; but, in the case of an infant, interest is then due without demand. If a father give portions

^g Bac. ibid.
486.

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portions to his children, payable at a certain age, without making any provision as to their maintenance, they shall bear interest from his death; for he is bound to maintain them^a.

^a 2. Salk.
415.

^b Coke 1.
inst. 111.

^c 33 H. VIII.
c. 1. 34 Hen.
VIII. c. 5.

^d Coke 1.
inst. 11.

^e 28 Cha. II.
c. 3.

^f Coke 1.
inst. 322.

^g Coke 1.
inst. 9, 112.

^h Ibid. 254.

THE term Devise is properly applicable to a bequest of lands and tenements, by a last will in writing. A devise, or will in writing, is no deed in a legal acceptation^b. At common law, no lands or tenements were deviseable by any last will or testament; but behoved to pass by solemn livery of seisin, or matter of record. This was introduced by the wisdom of the common law, for the same reasons with our law of death-bed, viz. that it is presumed one would do that in *extremis* which he would not do in his health, and that it proceeds from the distemper of his mind, by the anguish of his disease, or by undue persuasion, to which one, in such case, is more subject than in his health. But lands were made deviseable by statutes^c, *Whereby the antient common law was altered, whence many difficult questions, and most commonly disherison of heirs, (when the divisors are pinched by the messengers of death) do arise and happen*: these are the words of my lord Coke^d. Thus, all persons, having estates in fee-simple, may devise the same to any person, (except bodies politic or corporate) by his last will and testament in writing, or otherwise by any lawful act executed in writing; but wills by women-covert, idiots, and persons of non sane-memory, are void in law, as above. And, by another act, such wills or devises of lands, and tenements deviseable, must be signed by the divisor, or some other in his presence, by his direction, and subscribed in his presence by three witnesses at least, otherwise the same shall be utterly void^e.

37. Devise, properly a bequest of lands; this was not allowed at common law, but introduced by statute; the requisites to devises; persons disabled to make them.

IT is a maxim of the common law of England, That a last will or devise must be favourably expounded, according to the true meaning or intention of the testator^f; and therefore such devises are more favourably construed than deeds. Thus, where a man devises lands to one "for ever," without mentioning his heirs, it shall go to his heirs, or to one "and his assigns for ever;" or to one "to do with the land what he pleases," the devisee has an estate in fee-simple. Whereas a deed of such kind, for want of the word (Heirs) would only create the feoffee a tenant for life^g. And if a devise be to one, "and the heirs-male of his body," and he has only a daughter, who dies during his life, leaving a son, the son shall take. It is otherwise in a gift in-tail "to one and the heirs-male of his body;" for, in this the male must convey by males^h.

38. Devises of lands more favourably interpreted than deeds; instances of this.

WE agree with the law of England, as in the case of wills, in the first point; for, in an absolute disposition to one, without mentioning his Heirs, the land will go, notwithstanding, to his heirs, and it will not resolve into a liferent, as by the law of England it would, in the case of a deed of that kind. But, in the second point, we agree with their law, as in the case of deeds in-tail; for a conveyance "to one and the heirs male of his body," can never take effect in favour of the son of his daughter, in any event, and an heir-male must always connect his relation by males.

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39. By a devise of lands, the free-hold immediately in the devisee's person on the testator's death.

MANY things are good by devise that are not good by deed. In a devise of lands, the freehold, immediately upon the testator's death, is in the devisee; without any livery of seisin: such could not be during the testator's life, his will being still ambulatory; and, after his death, it was too late, since, by the law of England, seisin cannot be taken after the feoffor's death^a.

^a Littlt. 167. et ib. Coke.

40. Tho' a man devise lands to one and his heirs, yet, if the devisee die before the testator, it is void. The case of a joint devise to two.

IF a man devises lands to A and his heirs, and A dies in the lifetime of the devisor, the heir of A shall take nothing by the will; for the heirs of A were not named as the immediate takers, but only to express the quantity of the estate that he should have, viz. a fee-simple. If one devises lands to A and B, and their heirs, and A dies in the lifetime of the devisor, B shall take the whole land^b; wherefore the *Jus accrescendi* holds in this case, in the same manner as it did by the civil law. And I do not see why, in the case of a legacy with us, left in that manner, it may not hold, from the presumed intention of the testator.

^b Bac new abr. (devises) 86.

41. Devises in prejudice of creditors by specialties, void; how do such creditors bring their actions.

By special statute, intituled, *An act to relieve creditors against fraudulent devises*, it is ordained, "That all wills, concerning lands or profits, term, or charge out of the same, whereof the devisor shall be seised in fee-simple, in possession, reversion, or remainder, shall be deemed to be fraudulent and void against creditors, upon bonds or other specialties; and such creditors shall have their actions of debt against the heirs at law and the devisees jointly; and the devisees shall be liable, by force of the act, tho' the land devised be aliened before action brought^c," as I observed more fully in a preceding title^d.

^c 3 and 4 W. and M. c. 14.
^d Sup. tit. 4.

WE follow the antient common law of England, so that no lands, or other heritable subjects, can be disposed by testament, and the many hardships and frauds, complained of in these devises, shew the inconveniency of them.

42. The difference between a legacy payable at a certain age, and bequeathed at a certain age.

IF a legacy be devised generally to be Paid, or payable at a certain age, and the legatee die before that age, his executors or administrators may recover it, for it is a present debt, and only the term of payment delayed, *Debitum in presenti, solvendum in futuro*; but if a legacy is bequeathed to one At a certain age, or If he shall attain that age, and the legatee die before, in this case the legacy is lapsed^e. Our law follows the same rule.

^e Coke 10. rep. 51. 20. 1. Vent. 342.

43. Is the ademption of a specific legacy of a bond inferred from the testator's receiving payment of it.

WHERE a specific legacy of a particular bond is bequeathed, if the money is voluntarily paid in by the person that owes it, the legacy continues still good, recoverable out of the testator's other personal estate; but if the testator sues for, and recovers the money, this shows that he intended to make it his own, and so would not leave it to the legatee to recover, which therefore is an ademption of the legacy^f. Such rule is likewise observed with us, in conformity to the prescription of the civil law, and indeed to the nature of the thing.

^f Vent. Ibid. Arm's case.

44. If a debtor bequeath a sum of mo-

IF one is debtor to another, and, by will, gives him as great, or a greater sum of money than the debt amounts to, without taking any

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any notice at all of the debt, the legatee shall not have both the debt and legacy; but, if such legacy was given upon a contingency, that if the event should not happen, the legacy was not to take place, in that case, tho' the contingency shall actually happen, and the legacy become thereby due, yet it shall not go in satisfaction of the debt; because a debt which is certain, shall not be intended to be lost by an uncertain and contingent recompence^a. This would hold likewise by our law, as to the first case, upon the maxim, that *Debitor non præsumitur donare*; but this presumption may be excluded by the circumstances of the parties; and even, as to the second case, I conceive, that, from the reasonableness of it, the like will hold with us.

^a Ibid. Talbot. V. D. of Shrewsbury.

ney to his creditor, does it go in payment of the debt.

A MAN bequeaths all his personal estate to his executor, "To the use of his relations," without specifying any of them in particular. Those relations who, by the statute of distribution, would be intitled to the personal estate, if he had died intestate, shall, upon such general devise, be let in for the same proportions^b. This is a very good rule, and, no doubt, in such case, would be followed with us, so as the next of kin, who would be intitled to the effects of the deceased, if he had died intestate, would take the whole. In construing the statute of distribution, as to the computing the degrees of propinquity, the civil law, and not the canon law is the rule^c. This is likewise followed with us; for the moveables of an intestate go to his nearest of kin, according to that computation.

^b Ibid. Reach v. Hamman.

^c Vin. (Law) p. 569.

45. A devise to the use of the testator's next of kin goes according to the statute of distribution. In this statute the degrees of propinquity computed according to the civil law.

If provisions are made by way of legacy to children, according to the custom of London, in a will, they would be construed as so much of the dead man's part, and the legatees would draw their proportion likewise of the orphanage-part with the other children^d. And, in like manner, if the testator devise to his wife his personal estate for life, and after her death to certain other friends, this cannot exclude her from her customary share; she has an election to take the one or the other, but cannot take both the customary share out of the personal estate, and the life-estate of the remainder; but, if a jointure is limited to the wife, in bar of the dower only, it shall not preclude her of her customary share^e. In all which our law agrees with the custom.

^d Rep. of cases in equity, printed anno 1742. Carter's case, 7 Annæ.

^e Ibid. Kitchen's case, 9 Annæ. Aitken's case, 1 Geo. I.

46. If provisions are made to children by will, according to the custom of London, they will be presumed out of the dead man's part; what if a bequest is made to the wife.

If one makes no will, or names no executors in it, or the executors die before him, or refuse to accept, in all those cases he dies intestate, and the ordinary grants administration of the goods to the wife or next of kin, (with the will annexed, where there is such) who must find surety, and be accountable, and make distribution of the goods, as was observed in a former title^f. Originally the king, by his officers, used to seize the goods of the intestate, and pay their debts, &c. for advancement of the wife and children; or, failing such, the next of blood to the deceased, and afterwards this trust was committed to the ordinary, who was not bound to grant administration, but only to pay the debts to the extent of the goods, till the statute enjoined him to appoint deputies^g; and thereafter the matter was more fully regulated by subsequent statutes^h, as I related already. If there are divers administrators, one of them cannot sell goods, release debts, &c. without the other, but they must all concur; for they

^f Sup. tit. 4.

^g 31 Edw. III. c. 11.
^h 21 H. VIII. c. 5. 22 and 23 Char. II. c. 10.

47. In case of one intestate, administration granted.

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they have but one authority ^a. The duty and power of administrators is the same as of executors; and they farther give security, to be accountable for the goods in the inventory; as all executors, whether named by the testator, or appointed by the commissars, must do by our law.

^a Noy's max. 126.

48. An administrator accountable for the whole effects; but, if creditor, may pay himself first, in preference to those of equal degree.

As to the interests and privileges of an administrator. Tho' an executor regularly has all the residue of the testator's effects, yet an administrator has no advantage by his office; unless by paying his own debt first, if it is equal in degree with others, for the surplusage is to be distributed, as already set forth, between his wife and next of kin. If a debtor take administration of the goods and chattels of his creditor, it will not discharge him of the debt, for it will be assets; whereas, by making the debtor executor, the testator does thereby release the debt ^b. By our law, an executor dative, as nearest of kin, (who is an administrator) is preferable for his own claims against the deceased, to common creditors, next to the privileged debts.

^b Coke 8. rep. 8. 130. 1 roll. abr. 980.

49. What if administration is granted, and afterwards a will appears, and is proved.

If administration is granted, and afterwards a will is produced and proved, the administration is to be revoked, and all the acts of the administrator are void; but, if the executor is cited to prove the will, and did not appear, or if he concealed the will, all the acts done by the administrator are good, and shall bind the executor ^c.

^c 1 Roll. abr. 907.

50. What if an executor, after probate of the will, or an administration, die before the goods are administered.

If a person die intestate, and administration is granted to one who dies, without having administered all the intestate's goods, the ordinary must grant administration of the goods unadministered; and, if an executor, in such case, dies intestate, administration *De bonis non administratis, cum testamento annexo* of the testator, must be granted. Such administration ought to be given to the next of kin of the first testator or intestate, and concerns all the goods and personal estate which remain in specie, and the debts still due or owing. And, if a judgment was had in name of such deceased executor or administrator, in that case an administrator *de bonis non, &c.* may sue forth a *scire facias*, and take execution upon such judgment ^d.

^d Bac. new abr. (executors) 385.

T I T. IX.

Vitious Intromission.

1. The passive title of vitious intromission introduced to prevent embezzlement of the goods; who liable to it.

EXECUTORS confirmed have the only active title, with safety, to administer and dispose of the effects of persons deceased; but, if any wrongfully intermeddle therewith, he is liable, upon the passive title of vitious intromission, to make payment of the deceased's debts. This is justly introduced, to deter people from meddling with such moveables unwarrantably, which are easily embezzled. It is a singularity in our law, that vitious intromitters, or intermeddlers with moveables of a person deceased, are subjected universally to his debts. But the court of session are not at present so strict and rigorous, as they were of old, on this passive title; it is however a reasonable expedient, as above: and, by the salvos after observed, the fatal effects of such intromission may be easily avoided. Vitious intromitters,

intromitters, by natural equity, where the sanction of the particular law does not introduce other regulations, are only liable to the debts, to the extent of their intromission with a deceased's goods and effects, without a proper title. Because moveables pass in commerce, without titles in writing, it is not reasonable, that all who have in their possession the goods of persons deceased, and cannot produce their rights, should be liable to this passive title. Wherefore only those on whom an universal intromission, or *per universitatem* is proved, are subjected; but an intromitter with small things, or by a title of sale *bona fide*, will not be overtaken, tho' there was no confirmation^a. Not only those in family, as wife, children, or others near of kin to the deceased, may be liable, but likewise strangers; and more especially such, if they can shew no probable ground for their intermeddling; for then they are in the case of predonious or wrongful possessors.

^a Jan. 22.
1713. Stark.

If the possessor does not dispose of the goods, but only continues the deceased's possession, as being his wife, or other person concerned, it will not infer vicious intromission, but will be presumed *custodiæ causa*, in order to save them from embezzlement, they having an interest themselves to possess and preserve the goods. But, if the possession is in virtue of no colourable title, or on no probable ground, by one who hath no interest in the executory, his assuming the possession, even without disposal, will subject him to this passive title; because the worst is presumed in such case.

2. Possession
custodiæ cau-
sa will not
infer it.

ONLY the presumed design of embezzling induces this passive title; and therefore, if that is taken off, the intromitter is not liable to this heavy certification. Thus, one that has any colourable title, as where he inventars the goods by warrant of the commissar, or even of the judge ordinary, before intromission, he will be excused^b; because the creditors are secure: but a ratification *ex post facto*, or after the intromission had, will not be sustained. Nor will such inventorying do, if any thing material was knowingly omitted; but error in such case is excusable.

^b Dirlt. decif.
187.

3. Intromis-
sion, by war-
rant of a
judge, tho'
without con-
firming, se-
cures against
it.

To prevent the wrongful and unwarrantable intromission with the writings, evidences, money, and precious moveables of persons on their decease, in prejudice of their heirs, being minors, it is provided by act of sederunt^c, That the wife, or near relations present at one's death; or in case he dies at another's house, the master, or mistress thereof, shall, when he is *moribundus*, or incapable of sense, cause lock or seal the repositories where the same are kept, and the keys are to be delivered to the next judge ordinary, till the relations on the part of the father and mother of the person who is heir, if a pupil, be advertised to be present at the opening; or if a minor past pupillarity, till he, or some authorised by him be present; and, in default thereof, they shall be held as embezzlers or abstracters of the premises. This act seems calculated only to facilitate the execution of the act of parliament to which it refers, concerning the making up inventories of minors estates^d, and to secure their effects, till the tutors or curators take the charge of them. And even where the apparent heirs are minors, the neglect of sealing up the repositories cannot infer the embezzlement or abstraction of the writings, or other

^c Feb. 23.
1692.

4. The act of
sederunt
1692, touch-
ing the seal-
ing up of
the writings
of dying per-
sons, does not
concern this
passive title.

^d P. 1672.
c. 2.

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particulars described in the act of federunt, unless some intromission is proved in the case. And it being certain, that this passive title was introduced, and can only operate in behalf of creditors, this regulation which only concerns the benefit and security of the heir, when minority does not in the least relate to it.

5. A general disposition to the effects is a good defence against this passive title.

If the party's intromission is by virtue of a general disposition from the deceased, for onerous causes, it will no doubt save the intromitter from this passive title; because truly he intermeddles upon a singular title; and this will be sustained, tho' he did not attain possession till after the granter's death; and the party's rights and interests, in competition with other creditors, must be determined with respect to the value of the subjects, as accords of the law, or as the law prescribes^a; and it would seem, that whatever the disponent gets possession of in the deceased's life, must be good to prefer him thereon, if he is a creditor; but, as to what he makes effectual after the granter's death, otherwise than in consequence of confirming on the disposition, the same ought not to be available to give him advantage over other creditors. A gratuitous disponent will likewise be only liable to the simple values; and, to liquidate these, he may confirm, even during the process, and he will get allowance of what he paid *bona fide* to any of the creditors, before he was interpellated by suit at the instance of others of them. Where the claim against the intromitter is limited to restitution, he is not liable to make the goods forthcoming, unless the pursuer confirm the same, and thereby be enabled to discharge him, or except the defender had the possession from him^b.

^a Feb. 27.
1662. Chalmers. July 6.
1664 Brown.

6. The effect of intromission in a foreign country.

If the intromission or intermeddling was with effects in foreign countries, where no such passive title takes place, the party, tho' pursued here, can only be liable to the extent of the intromission, which can only have effect conform to the law of the place where it was had^c; for to the controul of it alone his actings were subject.

^b Dirlt. decis.
404. June 15.
1681. Baird.

7. Confirmation before citation, or even after, if premature, viz. within year and day after the ancestor's death, saves against it.

THIS passive title being founded on the presumption of fraud and embezzlement, if that is excluded, the passive title takes no place. Hence, if the intromitter confirm, without being interpellated by citation, at the instance of the creditor, who afterwards pursues, he, the intromitter, is safe; because he thereby makes a fair discovery of the extent of his intromission. But his confirming after the suit commenced will not afford a defence against the pursuer, except in the case of premature diligence, tho' it will against supervening pursuits of other creditors. The law, not intending to surprize any person into this penal passive title, allows year and day, after the predecessor's death, to intromitters to confirm; so that they cannot be overtaken within that time, even by creditors prematurely bringing actions against them, in that period, before confirmation^d.

^c Marcus
(heirs) March
1687. Glasgow.

8. How far an executor confirmed saves against this passive title.

NOT only the intromitters confirming before the creditor's citation, but likewise the executors nominate, or nearest of kin's having confirmed the subjects in question, affords a defence to the intromitter; because he is liable only to such executor, who is universal successor to the deceased in his moveable estate. But one's being confirmed executor creditor in the goods intermeddled with, will not secure the intro-

^d Jan. 24.
1628. Abdie.
Decem. 13.
1709. Drummond.

intromitter against the other creditors; unless he himself is confirmed such, or did intromit, by warrant from the executor creditor, granted before his intromission^a.

^a P. 1695.
c. 20. June
18. 1712.
Moor.

AFTER the like example, as an universal executor's being confirmed, so the deceased's escheat being gifted and declared before the creditors pursuit, secures the intromitter against this passive title; because he is only liable to the donatary. But the deceased's dying registred at the horn, and his escheat gifted, will not avail; unless it was likewise declared; or the intromitter had obtained the gift himself before intromission, at least intention of the cause, for then it needed no declarator as to the effects in his own possession; or that he had warrant from the donatary, which so far puts him in the same case, as if the gift was to himself, and his possession, in both cases, is by virtue of a lawful title^b.

^b Dirkt. decis.
205. id. d.
224.

IF the intromitter has a general disposition to the moveables, it saves him from the passive title, as above. And, for the same reason, if he is executor nominate, his confirming, even after commencement of the pursuer's action, and expiring of year and day from the testator's death, will save him from the universal passive title; because, in both cases, the intromission is in virtue of a title, and there is no presumption of fraud or embezzlement^c.

^c Decem. 13.
1676. Fair-
holm.

ONE vicious intromitter is liable for the whole debts of the deceased, without calling the rest: but, if a creditor pursues more intromitters, and takes decree against them, not bearing Conjunctly and severally, they are only liable jointly for a proportion of the debt, according to their number, without regard to the extent of their respective intromissions^d. But, where one vicious intromitter is overtaken for the whole debt, he hath relief from the rest proportionably, it being just, that where more persons are equally liable, they should all bear an equal burthen; for, tho' vicious intromission *Sapit naturam delicti*, favours the nature of a delinquency, yet that is only in the judgment of law, and in favour of creditors only, but otherwise it is a question of civil right; and, in cases relating to such interest, payment by one must afford mutual relief among persons equally subject thereto. And indeed, it is the opinion of the learned Craig, that if one, sued as vicious intromitter, make an allegation, That others whom he names were likewise intromitters, and prove the same, he can only be liable for a proportion of the debt, for which he relates a case, so decided by the court of session, after great dispute^e; but which, I conceive, would not hold at this day.

^d Feb. ult.
1626. Dou-
glafs. Nov.
16. 1626.
Chalmers.

^e Lib. 2.
dieg. 17. § 3.
lib. 3. dieg. 2.
§ 7. in fin.

VITIOUS intromitters with moveables of a person deceased are in no worse case than executors, excepting the benefit, competent to executors, of being liable only to the extent of their intromission. And consequently they have relief against the heir for heritable debts due by the ancestor; because the heir can reap no advantage, in respect to heritable debts, from the executory, whatever way titles are made up to it; or tho' the moveable estate is vitiously intermeddled with, that being *jus tertii* to him, or none of his concern^f.

^f Decem. 11.
1632. Schaw.

9. The deceased's dying registred at the horn, saves against it, if his escheat was gifted and declared, or was granted to the intromitter.

10. How far the executor, nominate, confirming after intention of the pursuer's action, is safe.

11. One of more intromitters, subjected in solidum, hath relief against the rest; if decreed simply, only liable conjunctly.

12. Vicious intromitters have relief against the heir as to heritable debts.

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13. Has the heir relief against intromitters for moveable debts.

ON the other hand, it should seem, that the heir has relief against vitious intromitters for the whole moveable debts; but the court of session is said to have found, that the heir's claim of relief behoved to be restricted to the value of the intromission^a. This seems hard, for a vitious intromitter would have been universally liable to the creditors in such debts, had they attacked him, without relief from the heir; and why should he be in a better case, by their insisting against the heir, and obtaining payment from him? Wherefore the case must have been such, that had the intermeddler been sued by the creditors, he would have been no farther subjected than to the value; or the point seems to merit to be re-considered.

^a June 15.
1711. Ewan.

14. What the case of super-intromission of old, and by our present usage, as to this passive title.

If the defender is executor confirmed, but it is alleged by the pursuer, That he has intromitted with subjects not contained in the inventory; or where a third person is confirmed, That the subjects in question are omitted, this super-intromission is judged of in the same manner, as if no confirmation had proceeded^b. So that, if the subjects in question are of no great value, the intromission with them will not infer the passive title; but otherwise super-intromission is relevant, or sufficient in law to exclude the defence of executor confirmed, according to former proceedings^c. But, since the court of session sustain a partial confirmation of an universal executor, sufficient to intitle him to the whole effects, as was above observed, it may seem to follow, that super-intromission will only at present subject the executor to the value, as is the case of a general disponee; but, in the case aforesaid, of the creditors of Murray, where it was so adjudged, there was no question about this passive title.

^b Spotswood
(executors)
Cleland.

^c Decem. 13.
1709. Drummond.

15. Notwithstanding the statute prohibiting charges to confirm, the passive title takes place, if the intromitters omit it.

THIS passive title proceeds in the same manner, since the late statute^d, which prohibits charges at the instance of the commissars or their fiscals, against intromitters with the moveables of persons deceased, to confirm, as it did before, as is above related. But, thro' default of such charges, the intermeddlers are frequently ensnared, not thinking of confirming, till they are overtaken by a creditor's preventing them by citation. So that, tho' the foresaid prohibition was for the ease of the subjects, in one respect, it often occasions prejudice to the indolent, in another.

^d P. 1690.
c. 26.

16. How far this passive title competent to creditors in heritable debts.

THO' creditors in heritable debts may sue the executor, who will have relief against the heir; yet it was found, that the passive title of vitious intromission is only beneficial to creditors in moveable bonds, but not to those whose debts are heritable, to which the heir is ultimately liable^e: but this case happened between an heir-male, and a party that purchased the estate from the heirs of line, whom the purchaser became bound to warrant against the creditors of the deceased, and likewise had acquired debts due by the ancestor; which debts the heir-male, who had evicted the estate, insisted to have declared extinct, by the vitious intromission of the heirs of line with the moveables of the deceased; but the court found, that this could only hold as to the moveable debts, but not as to the heritable debts, to which the heir-male himself would ultimately be liable. So that it is plain, notwithstanding this decision, in which these peculiarities occurred, that, in the common case, creditors in heritable bonds may

^e Dalr. Jan.
28. 1715.
Houston.

may have action against vicious intromitters, and it frequently happens, that the heritable estate is more than exhausted by heritable debts; and it were absurd that, in such case, the vicious intromitters should escape; or that, in the general, they should be in better case, in respect to heritable debts, than as to the moveable, or more favourably treated than executors.

* Jan. 16.
1628. Allans.
Decem. 13.
1676. Fair-
holm.

A HUSBAND'S continuing to possess and dispose of his moveables, after his wife's death, as before, will not subject him to her creditors on this passive title, in respect of her interest in the communion of goods^a; because, tho' a wife has a share in such goods, yet that is only after deducting the husband's debts, as the case stands at the dissolution of the marriage, and the man is only liable for that claim to such as make up a title thereto in the wife's right, and cannot be bound to abstain from using the same, the property thereof being still in him; so that tho' they are said to be in communion, because of the interest that accrues to the wife on dissolution of the marriage, yet they are his effects; nor is there any probable ground of fraud in the case: however, he is answerable for the value of the wife's share to such as confirm executors to her.

17. A husband's continuing to possess and dispose of his moveables, not subject as vicious intromitter to his wife's creditors.

ONE that acquires moveables from a vicious intromitter, *bona fide*, is not liable on this passive title; because he possesses on a singular title; but he will be liable to restore to such as confirm the subjects, since the property was not transmitted; nor has he right to demand the price, but must rely upon his author for recovery of the same: however, if he likewise, *bona fide*, aliened these effects before interpellation, he is secure, and the next haver becomes only liable. This must be understood under the limitation mentioned in the foregoing title, as to the species of moveables purchased from the nearest of kin; for since by attaining possession they acquire the property without confirming, they may transmit the same, and the purchasers are not only safe against the passive title, but likewise secure in the property of the goods.

18. Acquirers from vicious intromitters not liable, and, in some cases, not even in valorem.

THIS passive title was introduced only in behalf of creditors; and therefore it is not competent to the wife for her share, and, for the same reason, not to her nearest of kin, or creditors in her right, against the husband, in case of her predecease, as above; nor to the children for their legitim, there not being proper terms for any other demand at their suit, than a proportion of the deceased's effects. Nor indeed, for a similar reason, have legataries the benefit of this passive title; so that they can only pursue intromitters for the value; or the havers, in the case of special legacies.

19. This passive title not available to the wife as to her share, nor to the children as to their legitim, nor to legataries.

THO' the heir at law, by intromission with heirship-moveable, is peculiarly liable to the passive title of behaviour as heir, or *gestio pro herede*, yet any other, intromitting with such subjects as might fall under heirship-moveable, will be subject to the passive title of vicious intromission; because, as to the intromitter, there is no distinction between these and other moveables, and it is only in favour of the heir that they are so accounted; but, if he lies by, they may be confirmed as other moveables. A creditor likewise may confirm

20. Intromitters with heirship-moveable liable as vicious intromitters; such may be confirmed by creditors.

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them as executor-creditor ; for one that leaves more debts than effects, has, in the judgment of law, no effects ; *Bona cujusque intelliguntur quæ, deducto ære alieno, supersunt*. Heirship-moveable is only the heir's share of certain kinds of the free moveables, in a question with the executors or nearest of kin, and in this view one cannot burthen the heirship-moveable on death-bed, more than his other heritable estate ; but, if he do bequeath it, the legatary will have action for the value out of the other moveable estate, as being *Legatum rei alienæ scienter legata*, as was said of the legacy of an heritable bond, in the preceeding title.

21. This passive title not proponable by exception against a creditor ; but his debt may be declared extinct on that head.

IF one that is creditor intromits with his debtor's effects, his debt may be declared extinct, upon the passive title of vitious intromission. But regularly it cannot be proponed against him by way of defence, in any pursuit at his instance, against the representatives of the debtor, farther than to the value of his intromission^a ; because an intromitter may purge the vitiosity, at any time before action sued against him on that head, and the case of a creditor intromitter cannot be worse than that of others. But if a creditor, in a moveable bond, pursue the heir, the defence That he is vitious intromitter is good ; because, as such, he would be liable to relieve the heir of such debt^b.

^a Nov. 20.
1630. Pride.
Feb. 26.
1668. Reoch.

22. It does not pass against the intromitter's representatives, unless litiscontested with the deceased, in respect it is penal.

THIS passive title arising from the delict of the party, and being penal, passes not against the representatives of the intromitter^c, more than behaviour as heir ; unless sentence is recovered against him in his own life, or at least litiscontestation had intervened. This is most reasonable ; because the deceased intermeddler might have had defences against the allegation of vitious intromission, or grounds to exculpate himself, of which his representatives are presumed ignorant, who therefore are only liable *in valorem, i. e.* to the value of the subjects intromitted with by the deceased ; but the action, so far as penal, perishes by the party's death against whom it lay.

^b Dalr. Jan.
28. 1715.
Houston.

^c Dirlt. decif. 404.
July 10.
1666. Cranston.

Observations on the Law of England, in relation to the Premises.

1. Vitious intromitters termed, in the law of England, executors of their own wrong.

WHERE one intermeddles with the moveables of a person deceased, without a proper title, we call him a *Vitious Intromitter*, and, as such, he is liable to all the debts of the deceased. In England, such intermeddler is termed, *An executor of his own wrong, viz.* one that is neither executor or administrator, and yet acts as such, as by taking into his possession the goods of the deceased, and converting them to his own use, or delivering them over to creditors or legatees, in payment of their debts or legacies^a.

^a Coke 8.
rep. 355.

2. If there is an executor who proves the will, another person cannot regularly be executor of his own wrong, but sometimes he may.

WHEN an executor is made, and he proves the will and administers, in this case, if a stranger take any of the goods, or claim them as his own, that does not make him, in construction of law, an executor of his own wrong ; because there is another executor of right, who may charge him, and the goods which are taken out of the other's possession shall be assets in his hands. But tho' there be an executor or administrator, yet if the stranger take the goods, claiming them

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them as executor, and intermeddles as such, then, for such express administration, he may be charged as executor of his own wrong^a.

^a Coke 5.
rep. 33.
Reid's case.

ALL lawful acts that an executor of his own wrong does are good, and he must answer only for what he acts, but he cannot retain for his own payment; because from thence would ensue great inconvenience and confusion, since every creditor would endeavour to make himself executor of his own wrong, in order to satisfy himself by retainer, by which others would be barred^b.

^b Id. 5 rep.
30. Coulter's
case.

3. All lawful acts done by such executor subvert; but he cannot retain for debts due to himself.

AN executor *de son tort* (as an executor of his own wrong is called) makes himself liable, as far as he hath assets, to all the debts and legacies of the deceased, and subjects himself to the rightful executor or administrator; and if he pay such debts as were incumbent on the executor, according to the course of law, they shall be allowed him; and if, after he has paid out all that came to his hands of the deceased's effects, he be sued by another creditor, he may plead *Plene administravit*^c.

^c Bac. new
abr. (execu-
tors) 391.

4. An executor *de son tort* may plead *Plene administravit*, after all the effects are exhausted.

BUT if such executor *de son tort*, in an action brought against him, plead *ne onques executor*, or deny that he did intermeddle with any of the goods of the deceased, and it be found against him that some goods came to his hand, tho' of little value, as a bed-steed, or the like, he will, for such false plea, be charged with the whole debt sued for; but it is said that, in such case, where the things are of very inconsiderable value, the defendant may be relieved in equity^d. Our law of old was very severe upon vitious intromitters; but now that rigour, by recenter practice, is much relaxed, as appears from the foregoing title.

^d Bac. new
abr. (execu-
tors) 391.
ibid. 395.

5. If such executor deny that he did intermeddle, and it be found against him, he is subjected to the whole debt sued for.

T I T. X.

The Alterations in Feudal Holdings and Jurisdictions in Scotland, by the two late Statutes of the 20th of his present Majesty.

^a 20 Geo. II.
c. 43, 50.

I HAVE treated in this, and the preceeding books, of feudal tenures, and spoken somewhat of jurisdictions as they were formerly in use with us, and transiently of the alterations made in our law, in respect thereto, by the two late statutes^a abolishing ward-holdings, and the higher heritable jurisdictions. But a more particular discussion of the same will not be improper, and to that purpose I shall allot this title, that the whole alterations in our law, upon that occasion, may be exposed to the reader's eye at one view, and which I apprehend is a fit preliminary to what I am to discourse at large upon jurisdiction in the next book. I shall begin with the act touching ward-holdings.

1. Here set forth at large the alterations in our law, by the two statutes of the 20th of his present majesty.

THE feudal tenures, which we call Ward-holdings, from the principal casualty thereto incident, were originally military fiefs, and are therefore termed Holdings by knight-service. In England and elsewhere, the vassals were bound to furnish a soldier for each knight's fee they possessed. We had no certain rule for the value or extent of a knight's fee: but in England it was lands to the value of 20 pounds Sterling yearly, in William the Conqueror's time, which, at present, would amount to more than a rent of 500 l. Sterling^b.

^b Littl. sect.
110. et ibid.
Coke.

2. The original of feudal holdings for military services; the extent of a knight's fee.

AND

3. The origin of the casualties of recognition, ward and marriage; these, with us, proceeded from the free offer of the subjects to the sovereign, for increase of the revenue.

AND that the vassal might be capable to afford his quota of soldiers for the war, he was disabled to alien more than the half of the ward-fee, on pain of forfeiting the whole by Recognition to his lord, who might, by that means, provide himself with another that should be in condition to do it. And whereas one under age was not supposed capable to officiate in the service, the fee, during the minority of the heir, was in the superior's hands by the casualty of Ward, that he might, out of the rents and profits thereof, provide himself with a fit person to discharge the duty in the mean time; but the king, or his donatary, or other superior, was always liable to maintain the heir. And farther, if the heir was not married in the life of the ancestor, and thereafter married without the superior's consent, or even tho' he died unmarried after his age of 14 years, the superior was intitled to such sum of money as was presumed the vassal might have received of portion, which was commonly rated at two years free rent of his estate, personal and real, after deduction of all his debts; and if the heir married not the woman, without disparagement, offered to him by the superior in due form, and married another, he incurred double the value of such portion, which was estimated at three years free rent, but which last is observed by the lord Stair never to have taken effect^a. This was termed the casualty of marriage, and was introduced to prevent the vassal's marrying into a family perhaps not in friendship with the superior. Those casualties of ward and marriage were introduced with us upon a free offer, by the subjects to the sovereign, for enlarging the revenues of the crown, that thereby the king might the better support his royal dignity^b. And we are informed, by the English historians, that the same were introduced into England upon the like occasion^c, and of course the same benefit was allowed to subject-superiors.

^a Inst. p. 258.

^b Leges
Malc. II.
c. 1.
^c Baker, &c.,
on Hen. III.

4. Tenure by knight service long since abolished in England; and now taken away with us; as also the casualty of marriage; and prohibitory clauses in other holdings, by the late act.

IN England the tenure, by knight's service, was long since abolished^d. And because the ends for which the casualties accompanying it were introduced, took no longer place, armies being now otherwise raised, and soldiers levied without regard to ward-holdings, or obliging those vassals to furnish soldiers more than the other subjects, and the revenues of the crown being out of other funds, and its exigencies otherwise supplied, it was most reasonable that this tenure should likewise have been taken away with us at the same time. And now, by the benignity of his present majesty, that tenure, with all its inconvenient consequences before mentioned, is abolished by the late statute^e. And because, in certain lands held by the tenure of feu-holdings, clauses were insert, giving the superior the casualty of marriage, and prohibiting the vassal to alien the fee without the superior's consent, the casualty of marriage consequent upon such holding, and such prohibitory clauses restraining the power of alienation, are discharged by the same act.

^d 12 Cha. II.
c. 24.

^e 20 Geo. II.
c. 50.

5. Lands that were holden ward of the crown converted to blench-holdings, and the non-entry duties only

AND as to such lands holden of the crown, whether by simple or taxt-ward, they are enacted to be turned into blench-holdings, for payment of one penny Scots at Whitsunday yearly, if asked; and, instead of the new retour-duty, which, in other blench-holdings, takes place, as the non-entry duty, one pound Scots for every hundred pound of valued rent, is only due in such converted holdings preceeding

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ing the citation in the general declarator of non-entry. And in all special services of heirs in such lands, the retour, over and above setting forth the old and new extents, must specify the valuation of the lands, in order to ascertain the quota due for the non-entry. But the non-entry, as to other lands holden of the crown, and, as to all lands held of subject superiors, is regulated by our former law.

one per cent.
of the valu-
ed rent.

AND lands holden ward, whether simple or taxt, of subject superiors, are, by the same act, turned into feu-holdings; and the casualties and services are to be valued by the court of session, at a certain yearly rent or feu-duty, payable to the superior in place thereof. And the lords were enjoined to make an act of sederunt, prescribing rules for adjusting the reasonable satisfaction or recompence for those casualties. And, in case of difference arising between the superior and vassal, in adjusting the same conform to those rules, the court, upon summary application to them, by either superior or vassal, is to determine the quantum of the annual feu-duty, which shall be payable yearly at Whitsunday; and until such modification shall be made, the vassal shall incur no irritancy for non-payment of the feu-duty. And if the ward-lands are subject to a liferent, which would be exclusive of the casualty of ward, such liferenter is declared not liable to the annual feu-duty, which shall only commence after the determination of the liferent-right. But if the liferent is not total of the whole, the entire annual feu-duty shall be payable to the superior, during the subsistence of the liferent, by the fiar or proprietor, out of the lands not liferented; at least so far as the same can afford it.

6. Lands holden ward of subjects, simple or taxt, converted to feu-holdings; the casualties to be valued by the court of session; and, in lieu thereof, an annual feu-duty made payable. The case of life-renters.

^a Feb. 8.
1749.

IN pursuance of the foresaid statute, the lords of session, by their act of sederunt^a, have enacted and declared, That, for lands holden simple ward, a subject-superior shall have, in satisfaction of the casualties of ward and marriage, and of all other casualties consequent on such holdings, two *per cent.* of the constant yearly rent as the same yielded and were worth on the 25th of March 1748, the period at which the statute took place, and may in time coming pay, deducting one fifth part as the value of the teinds, where the teinds are not held-ward of the said subject-superior, but otherwise including the said fifth, after deduction of the minister's stipend: with this proviso, that if the vassal hold other lands of the king or prince, he shall only be liable in one *per cent.* of the constant yearly rent, as a feu-duty, in consideration of the ward; in respect that no casualty of marriage, in such case, is due to the subject-superior. Nor shall the kain and services be computed, unless they are valued, and the heritor has an option either to exact the same in kind, or the converted price.

7. The value of the casualties of ward, and marriage in simple ward, declared to be an yearly feu-duty of two per cent. of the constant rent.

AND, by the same act, the rule in taxt-ward holdings is, That, as an yearly feu-duty, one fiftieth part of the sum taxed for the ward shall be the value of all the casualties consequent upon such holding; and these values shall be only payable yearly at the term of Whitsunday, for the year preceeding.

8. The rule in taxt-ward.

9. Whether the lands holden of the principality considered as holding of the crown or a subject, as to questions upon this statute.

I HAVE treated of the Principality in another place^a, where I have suggested that it was in the person of the prince, as common lands holden of the king by any subject, and that so the lands holden ward of the principality were comprehended under this clause in the statute touching lands held ward of a subject-superior, and to be converted into feu-holdings. But, upon examining the case, this may justly be doubted, and it may seem, the principality should be deemed part of the patrimony of the crown, and, in this view, the lands holden of it be adjudged as holden of the king, and converted into blench-holdings. It is certain that the principality consisted of the great possessions which Robert II. the heritable Stewart of Scotland had when he succeeded to the crown, and consequently that estate was truly his own patrimony, and we see that it remained always thereafter in the king's person, as any other part of his patrimony, till he had a son, who became prince and Stewart of Scotland, and enjoyed the lands of the principality. This course was probably introduced by a grant of the same, from Robert III. to his eldest son, afterwards king James I. of which a copy is still extant. But as that can be no evidence, all the ground we can proceed upon is the statute of James IV.^b which ordains, That the free tenants of the principality should compear and answer in the parliament, till the king should have a son to answer for them. And consequently the principality may seem to be holden as part of the royal patrimony allowed to the king's eldest son, for his interim support, and who was to represent the tenants in parliament. But the case is not without difficulty on either side; and it may be thought that neither of these cases can hold, for that the lands holden of the principality did not hold of the king at the date of the statute, but of the prince; and tho', in a certain respect, they are deemed as lands held of the king, as in the qualifications of electors of members of parliament, by the act 1681; yet we see that before they were not so regarded. Nor can they be considered as lands holden of a subject-superior; because the prince was never infeft in the lands as Stewart of Scotland, as neither were any of the preceeding princes; and it were incongruous that any lands should be holden of a subject-superior, who himself is not infeft in the same. So that, in strict law, the late prince may seem to have had it in his option, as to the lands holden of him, still to continue them ward, as not falling under the statute: but he generously prevented the question, by ordaining the lands holden of the principality to be converted into blench-holdings; and as to several of them, charters were accordingly expedited. But now, by his much lamented death, it may be doubted whether his eldest son, who is created by his majesty prince of Wales, be intitled to the principality in Scotland, as Stewart of Scotland; and it would seem that he is not, since the foresaid statute, which is the only authentic record or authority upon this point, speaks of "the king's Son to be mediate between him and the vassals of the prince." Wherefore the court of session justly exempted the lands holden of the principality, from the rules laid down in their act of federunt, pursuant to the purview of this statute.

^a B. 2. tit. 3.
§ 19. in med.

^b P. 1489.
c. 16.

10. The infestments of ward-lands to stand

IT is likewise provided, by the foresaid statute, That the infestments now standing in the persons of the vassals holding ward, shall remain good to all intents and purposes, so long as they shall retain the

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the same; and they shall, by virtue of the act, be no longer subjected to the casualties discharged, but only to pay the annual, blench or feu-duties in place thereof. And farther, it is enacted, that no tenure of lands, or heritages by ward-holding, shall hereafter be created by his majesty, his heirs or successors, or by any other superior. Nor shall any rights be granted for holding lands *feu cum maritagio*, or with prohibitory clauses restraining the power of alienation, and such provisos are entirely discharged; so that, even as to preceeding rights, they can have no effect.

good to the parties; no ward tenures to be granted thereafter.

THIS was a most gracious concession of his majesty to his subjects, freely to pass from the casualties of ward-holdings; such royal bounty ought to raise in their minds a due sense of gratitude and loyalty. In former times a scheme was formed to convert ward-holdings of the crown into feu-holdings, and commissioners were appointed by the king, pursuant to an act of parliament, for valuing the casualties and consequences of these holdings, and the vassals were to pay the price or composition, and an annual feu-duty to the king, and such holdings were still to be considered as ward-holdings, so as to exclude the subject-superiors from the casualty of marriage, in case the vassals held other lands ward of them^a. But the plan laid down in this statute is more equitable and generous, by enfranchising the ward-vassals from the burthen of these casualties, without any recompence or consideration given for the same; and no doubt the rigour of the terms rendered the former plan generally ineffectual. Indeed some ward-vassals formerly, out of special favour, obtained their holdings to be converted to blench-tenure; but now the benefit is universal to all the subjects, without distinction or partiality.

11. This is a most gracious and generous royal concession. Why former measures for converting ward-holdings of the crown into feu or blench-holdings proved ineffectual.

^a P. 1661.
c. 59.

AND, for facilitating the making up titles in the persons of heirs and singular successors in lands and heritages holden of subject-superiors, it is, by the same act, declared lawful and competent for any person who shall be duly served and retoured heir in special therein to his predecessor; and to any person who shall purchase or acquire lands and heritages from any heritor duly vested and seised therein by a conveyance, containing a procuratory of resignation, to apply to the ordinary on the bills, who, upon production of a special retour, or such disposition, shall grant warrant for letters of horning, upon 15 days, to charge the superior to receive and enter the heir or disponent in such lands respectively. Provided always that no superior shall be obliged to give obedience to such charge, unless the charger at the same time pay or tender to him such fees or casualties as are due to him upon such entry.

12. Superiors bound to receive heirs and singular successors by disposition, containing procuratory of resignation.

The superior may suspend such charge, if the heir or disponent does not tender what is due to him for an entry, or if he has any other just cause to refuse it. If he does not suspend, and yet delays or refuses to enter the charger, personal execution may go against him, at the charger's instance, if a commoner; but if a peer, the only remedy seems to be to apply to the next superior, and the last resort must be to the king, who refuses none. And, in such case, the superior, who without reason disobeys such charge, must, of course, lose the benefit of the superiority during his life, according to the prescription

13. What if the superior refuses to obey such charge.

on

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on of our law, as it formerly stood, which, in that respect, is not varied.

14. The great benefit of this new regulation.

THIS is a great ease to heirs and disponees; for before, where the superior would not receive the heir of the vassal, by granting a precept for infefting him, the heir, specially retoured in the lands, behoved to charge him on consecutive precepts out of the chancery, in the king's name, three several times, to receive him, and, upon his refusal, take instruments; and then, if the lands held of the crown, he must have applied to the court of session for a warrant, to the director of the chancery, to issue out a precept of feisin in the king's name; to the sheriff of the county where the lands lie, to give him feisin therein. And if the lands held of other intermediate superiors, the heir behoved to run the same course with each of them till he arrived at the crown, and then proceed as above, which was vastly tedious and expensive. And no superior was obliged to receive disponees, which necessitated them frequently to adjudge in implement, in order that, in the character of adjudgers, they might charge him to receive them, on payment of a year's rent. Which expensive and tedious circuit of diligences is now happily prevented by this new regulation.

15. Is a superior bound to receive a corporation.

THE act bears, "That it shall be lawful to any person who shall purchase lands or heritages, from a proprietor duly vested and seized therein by disposition, containing procuratory of resignation in his favour, to apply for a warrant to charge the superior to receive him, &c." It may be doubted if this can extend to borrows, or other corporations who purchase lands, that the superiors are, in virtue thereof, compellable to receive them; and it would seem that they cannot be comprehended under these words, since, tho' they are political persons, yet, where they are intended, they are always characterised, in the English and British statutes, *Bodies Politic*. And therefore, in order to intitle them to the benefit of this act, they must chuse one of their members for vassal, thro' whom, and his heirs or successors in his office, if it is for life, the superior must have the chance of his casualties, which otherwise would be lost, if the corporation, which dies not, should be received as vassal; more especially since this was our law formerly^a, which cannot be understood to be innovated, unless it had been particularly exprest. I had occasion to take notice of this case more at large in another place^b.

19. The fees and casualties due to superiors, by heirs or disponees, for an entry.

THE statute mentions only in general, "That the heir or disponee applying for an entry, shall pay, or tender to the superior, such fees or casualties as he is by law intitled to receive." And therefore this must be explained from our law as it then stood, and does at present. As to the heir it can only be meant of the non-entry duties and relief. And as to disponees, of the year's rent, which was due as a composition to superiors by adjudgers, upon their being received, of both which I have largely treated elsewhere^c. For tho', by our former law, a superior was not bound to receive a disponee as such, but only under the character of an adjudger in implement, and consequently there could be no fixed rule where he entered a disponee voluntarily, yet the usage having been, that superiors, for most part, entered him without the circuit of an adjudication, the com-

^a July 23. 1713. university of Glasgow varied on appeal.
^b Sup. tit. 2. § 20.

^c B. 2. tit. 4. sect. 3.

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composition must be the same, as was due from adjudgers in implement; all that this statute does in that respect, being to supersede the necessity of such inconvenient diligence.

IF the superior himself is not entered to the superiority, I conceive, that the former practice of charging him to enter heir in special to the superiority, and receive the heir of the vassal, must take place; and thereon a declarator of tinsel or loss of the superiority, during his life, must be insisted in, and the next superior, if a subject, or the director of the chancery, if his majesty is the next superior, must be concluded against to receive the heir. And this course, where the superior's heir is not entered, must likewise be followed in the case of a disponent, who, by the late statute, is intitled to be received in the same manner as an heir; or the disponent may follow such course as was formerly competent, in order to obtain himself seised by a public investiture.

20. If the heir of the superior is not entered, he must be proceeded against as formerly, before the late act.

AND, by the same act, single and liferent-escheat, consequent upon denunciations, in relation to civil debts, and performance of obligations, as rigorous, and liable to be abused, are taken away, and discharged in all time coming: but such still continue to fall, as before the statute, upon denunciations for criminal causes; or where they are the statutory penalties of certain crimes. And, with great submission, it would seem to have been highly reasonable, that the same should likewise fall upon denunciations, for non-performance of deeds or facts: as for example, in the foresaid case, of the superior's being charged to receive an heir, adjudger or disponent, and disobeying; more especially, in the case of peers and married women, who are not liable to personal execution for civil causes, and the pointing or arresting the goods of the party disobeying the charge, cannot take place in cases of that kind, which are not for liquid sums. This inconveniency was intended to be remedied, by a clause in a bill, which was past in the house of commons last session of parliament. But that bill did not succeed in the house of peers, and the case must be referred to the further consideration of the wisdom of the parliament.

21. Single and liferent-escheats taken away in civil cases, but not in criminal; advisable that it fell on denunciations for non-performance of facts or deeds.

By this statute likewise, where lands found necessary for the service of the public, as for erecting citadels or forts, or making settlements of garrisons, are part of a tailed estate, under strict, irritant, and prohibitory clauses, it is declared lawful to the person therein seised, to sell any part thereof, which his majesty, his heirs and successors shall think fit to purchase, for the above purpose; with this proviso, that the price shall be laid out and settled to the same uses, and with the same limitations and restrictions, as such land was settled before the sale, or applied for payment of the debts affecting the tailed estate; and is to be paid to trustees appointed by his majesty, and such vendor, who shall apply the same, in manner above-mentioned.

22. Heirs in strict entails, allowed to sell to the king part of the lands, for the service of the public.

SOMETIMES superiorities happen to be comprehended under a strict entail, so that the vassals have it not in their power to purchase the same, in order to become the immediate vassals of the crown,

23. Heirs of tailie may sell superiorities, in or-

der that the
vassals may
hold their
lands of the
crown.

the superiors, under such entail, being disabled to sell the same; therefore, it is enacted, "That it shall be lawful to such superiors
" to sell to the vassals the superiorities over their respective lands, at
" such prices as the parties shall agree for, and thereupon to resign
" such lands for new infeftment to such buyer of his own superiorities." It may be a question, if, where such entailed superiorities are not holden of the crown, but of a subject-superior, such superiors be enabled to sell in virtue of this proviso. But, I humbly think, that since the intent of the legislature was to enfranchise the vassals, such superior may sell the lands, thereby empowering the vassals to purchase likewise from the intermediate superiors, that so they may at last become the immediate vassals of the crown, which, as the act justly suggests, ought to be encouraged. At the same time, it is specially provided, That the money paid as the price of such superiorities, shall be laid out and settled to the same uses, and under the same limitations and restrictions, as the same were settled before the sale thereof, or for payment of the debts affecting the tailied estate, and shall be paid to trustees appointed by the heritor and purchaser to be applied accordingly.

24. Vassals
free from at-
tendance at
their superi-
ors courts,
unless speci-
ally summon-
ed: the Mi-
chaelmas
head-court of
the freehold-
ers excepted.

AND, for the greater ease of the subjects, it is declared by the same act, That no proprietor of lands, holden of the king, or of any subject-superior, shall be obliged to appear, and give suit and presence at any head-court, or to be liable to any fine or penalty for default of attendance thereat; unless he is lawfully and specially summoned for that effect, to serve as a jury-man upon trials, or upon any other lawful purpose: provided always, that nothing contained in the act shall derogate from the powers competent by law to the freeholders, assembled at their Michaelmas head-court, to act and proceed therein as formerly.

25. Tenants
liable to no o-
ther services,
but those
specially
mentioned
in writing,
mill-services
excepted.

As this act takes care to enfranchise vassals from divers hardships and inconveniencies, so it relieves the tacksmen, or tenants of lands, from disputes between the landlords and them, occasioned by a provision frequent in leases or tacks, of *services used and wont*, or services indefinitely, over and above the rents and duties specially mentioned. It ordains, "That no tenant, whether by lease in writing,
" or verbal agreement, or otherwise, shall be liable to perform any
" services whatsoever to the heritor his landlord, other than such as
" shall be particularly reserved and specified in some written lease or
" tack, or by some agreement in writing, duly signed by the par-
" ties;" but which is not to extend to leases or tacks dated before first July 1747; nor to services by law or custom, due to mills, or any matter or thing thereto relative.

26. By taking
away ward-
holdings,
base tenures
may be much
increased, to
the great in-
conveniency
of the sub-
jects. This
may be pre-

As this is a most beneficial law, so the abolishing ward-holdings will multiply base tenures, viz. holdings not of the superior, but of the disposer. This in ward-holdings could not safely be practised, least recognition might be incurred by the vassal's alienating more than the half; and now, that danger being removed, there is no bar against base-holdings of the same lands, or other heritable subjects by infinite degrees. This occasions great inconveniencies in our land-securities; for, by the many gradations, the last sub-vassal, who is the

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^a 2 Stat. Rob.
1. c. 25.

the proprietor, cannot easily discover how to make his right good, by completing his title; since, unless all the intervening sub-feuars, who are the mean lords, or intermediate superiors, make up their titles, his cannot be good. Such inconveniencies could be prevented, by reviving our old law ^a, whereby all singular successors in lands were to hold of the disponent's superior. This may be the subject of a further improvement of our law, as occasion shall offer.

vented, by
renewing our
old law.

^b 20 Geo. II.
c. 43.

^c Article 20.

As, by this act, the king out of his royal benignity freely past from the casualties in ward-holdings; so, by the other act of the same parliament ^b, the higher heritable jurisdictions in Scotland, which were competent to divers lords and commoners, and mostly incident, or annexed to ward-holdings, are abolished, or restored to the crown whence they proceeded. And, tho' they be reserved as rights of property, by the treaty of union ^c; yet that did not hinder them from being taken away, either for the public good, upon giving a reasonable satisfaction, or with consent of the owners. Now, the public good was concerned, in extending the influence, benefit and protection of the king's laws, and courts of justice, to all his majesty's subjects, by abolishing the eminent heritable jurisdictions, as the preamble of the statute justly takes notice; and, since the owners have received suitable satisfaction for the same, they cannot surely complain, after such full acquiescence. And, as to the persons subject to those jurisdictions, the act is for certain a most beneficial law, as freeing them from divers hardships and inconveniencies to which they were thereby liable, and affording them the protection of his majesty's laws, and courts of justice, equally with the other subjects of Scotland. And an uniformity in the administration of justice, is thereby introduced, which tends to the public good; and the regulation made by it, touching our sheriffs, is a most wholesome proviso, for the benefit of the subjects of North-Britain.

27. The justice of the act abolishing the higher heritable jurisdictions in Scotland; this no breach of the article of the union, reserving the same as rights of property.

By this act, All heritable jurisdictions of justiciary, all regalities and heritable bailiaries, and all heritable constabularies, other than the honorary office of high constable of Scotland; and all stewardries, being parts of shires or counties within Scotland; and all heritable sheriffships, and deputy sheriffships, that are likewise parts only of shires or counties, belonging to, or claimed by any subject in Scotland; and all jurisdictions, powers, authorities, and privileges thereunto appurtenant or annexed, or dependent thereupon, are, from and after 25th March 1748, abrogated, taken away, and totally extinguished; provided, that all lands annexed, or belonging to the said heritable bailiaries, stewardries and constabularies, and rents and duties payable to the possessors of the same, shall remain with them, notwithstanding the extinction of the offices.

28. All heritable justiciaries, regalities, bailiaries, constabularies, (other than the office of high constable) and all heritable sheriffships and stewardries in Scotland abolished, or resumed to the crown.

It is likewise provided by the same act, That all jurisdictions, powers and authorities, legally vested in, or belonging to any such justiciary, regality, bailiary, constabulary, stewardry, sheriffship, or deputy sheriffship, shall, after the said 25th March, be vested in, and exercised by the court of session, court of justiciary, judges in the circuits, and the courts of sheriffs, or stewards of shires or counties, and other the king's courts in Scotland respectively, to which the

29. To what courts do the powers and authorities that belonged to these jurisdictions accrue.

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the same would have belonged; in case such justiciary, &c. had never been granted or erected. And the several towns, places and bounds which lie within, or were subject to the same; and the inhabitants and residents shall be subject to the jurisdiction and authority of the king's courts aforesaid, in the same manner, as if such heritable jurisdictions had never existed.

30. Heritable sheriffships and stewartries resumed to the crown; how to be granted thereafter.

AND, by the same act, All sheriffships and stewartries, possessed by any subject in Scotland, either heritably, or for life, are resumed and annexed to the crown, and the sheriffs or stewarts of the same shall be nominated and appointed by his majesty, his heirs and successors, and for no longer certain time than one year. But that cannot hinder, I conceive, such sheriff-principal or steward to be constituted, without any limitation of time; and, in such case, his office will continue till the same is recalled, or a new nomination be made. And it is likewise ordained, That no heritable justiciary, regality, constabulary, or bailiary, nor any judicature, jurisdiction, authority or immunity of the like nature or kind within Scotland, shall, at any time hereafter, be created or erected; and all letters patent, gifts and grants of the same, are declared to be void and null, to all intents and purposes.

31. A suitable recompence enacted to be given to the owners of the jurisdictions abolished: how the same to be valued, and the price made effectual.

AND, since it had been an unsupportable hardship to deprive the owners of such jurisdictions of their rights, without a suitable recompence, it is provided by this act, That reasonable and just compensation and satisfaction should be made out of the next aids that were to be granted in parliament, for every such justiciary or other heritable jurisdiction taken away, or resumed and annexed to the crown, to the persons lawfully possessed of the same; and to every clerk thereof lawfully possessed of the office of clerkship, on the 11th of November 1746, in case such office shall be necessarily extinguished in consequence of this act. The persons having right were to enter their respective claims to the said jurisdictions or clerkships before the court of session, in manner directed by the act. And the court was ordained, in a summary way, to examine the validity of the claimant's title, and the value or price thereof, and declare their opinion touching the value of such as they should find valid, and cause their judgment thereon to be entered into a roll or book, and certify the same to the king in his privy-council, copies of which were to be forthwith laid before the two houses of parliament.

32. Where such jurisdiction is contained in a strict entail, the price must be applied in paying the debts affecting the estate, or in purchasing lands in terms of the tailie.

AND that justice might be done to the heirs of entailed estates, it is likewise ordained, That where any such heritable jurisdiction was subject to a strict tailie, affected with irritant and resolute, or prohibitive clauses, the value and price thereof shall, by order and direction of the court of session, be laid out in the purchase of lands, to be settled to the same uses, and under the same limitations and restrictions, and in the same course of succession, upon which the said jurisdiction was settled; or applied in payment of the debts affecting the tailed estate. And the heir of tailie or substitute; as likewise the guardian, tutor, curator or trustee of any infant, minor, idiot or lunatic, or furious person having any such estate; or any mortgagee or incumbrancer may exhibit a petition to the court of session, praying their

their directions for laying out, or investing any such sums of money in the purchase of lands; or for placing out the same on any good security, until such purchase shall be found: and, in the mean time, the money shall be paid into, and remain in either of the banks of Scotland, and, after such directions are given, shall be paid out to such person, as is by such order or interlocutor authorised to receive the same.

PURSUANT to this ordinance, the court of session examined the titles of the several claimants, and made their report, touching the value of such as they sustained, to his majesty; which was laid before the parliament, and approved by them, without any variation; and measures were taken for payment of the recompence to the several persons found intitled thereto, and which was issued and paid accordingly.

33. The jurisdictions valued, and the values received by the owners.

THAT the records of such abrogated courts might be preserved, and the course of justice not interrupted, it is ordained, That all decrees and proceedings of, or in any of those abolished courts which were awarded, or depending before the said 25th of March, shall remain in the same force, as if the act had not been made; and all records, decrees and proceedings relative to any civil or criminal cause in such courts, were ordained, on or before the 25th of June 1748, to be transmitted by the possessors of any such justiciary, or other abolished courts, to the courts of the respective sheriffs and stewarts of counties, and there lodged and kept among the records of such courts; and the judges thereof are enjoined to proceed thereupon, as if the said civil or criminal causes had been originally commenced before themselves.

34. The records of decrees and proceedings relative to any civil or criminal causes, in any of the courts abolished, to be transmitted to the sheriff or steward-courts.

THE register of hornings, inhibitions and interdictions heretofore kept in any court of regality, bailiary of regality, or stewartry, abrogated by this act, were appointed, within the time foresaid, to be transmitted to the general register-house at Edinburgh. Hence, it is plain, that inhibitions, and other letters or writs that formerly behoved to be published at the market-cross of the head-burgh of the regality, within which the party, against whom the diligence was used, dwelt, as well as at the market-cross of the head-burgh of the shire or stewartry, within which such regality lies, need only be executed against the party, and published or executed against the lieges, at the market-cross of the head-burgh of the shire or stewartry where he dwells, and registred in the sheriff or steward-books respectively. This greatly tends to the benefit of the subjects of Scotland, and security of their rights and diligences, which were frequently voided, thro' omission to execute the same at some of these places.

35. The register of hornings, inhibitions and interdictions, kept in any of the abrogated jurisdictions, to be transmitted to the general register; no need in time coming to execute letters at the head-burgh of a regality or bailiary.

BUT what is still more considerable, the lords, and other persons who were vested with the heritable justiciaries, regalities and bailiaries, had right to all the escheats and fines of those living within their bounds, which created no small dependence of the people upon them. This privilege might have been used to very bad purposes, especially where the criminal sentences of their bailies were not subject to a review of the court of justiciary: this was the singular case

36. The great conveniency to those living within regalities, &c. by abolishing the same, whereby they are delivered from many hardships.

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or other heritor, a baillie appointed by him is the judge; and in borrows the magistrates of the same; and in such as are independent of any of these, the sheriff-depute of the county must exercise his jurisdiction in them.

43. The jurisdiction over coaliers and falters, not extended to workers in mines of other sorts.

It is likewise declared, by this act, That each proprietor of coal or salt-works, and mines, is at liberty to exercise such power and jurisdiction, as is competent to him by law, over his coaliers and falters, or other workmen; but which is not to extend to cases inferring loss of life or demembration. It may seem, from this proviso, that it is a virtual extension of the several laws and customs touching coaliers and falters, to the workers in mines of all sorts; for it supposes the same power and jurisdiction to be competent to the master of the one as of the other, there being the same reason in both, *viz.* the usefulness of these works to the public, and the necessity of severe discipline to keep the servants in order, and to prevent or correct the mischiefs and inconveniencies that may happen thro' their licentiousness, and all such workers, concerning mines, are workers under ground; for a coal-pit or sink is a mine, as much as that for metals of any kind. But since our statutes specially mention coaliers and falters, and servants in salt-works and coaleries, and that such jurisdiction is only reserved to owners of coal and salt-works and mines, as was competent before; no new jurisdiction can, by the statute, accrue to them, and it cannot be construed to give them any more power than they had before over miners, or other workers in subterraneous operations. I have spoken in another place of this state of coaliers and falters^a, which cannot be applied, in consequence of this statute, to workers in mines of other kinds.

^a B. I. tit. 2. § 82.

44. Baron baillies must take the oaths to the government, each on pain of forfeiting ten pounds.

THE baillie who officiates as judge, in any baron court, must take the oaths, appointed by law to be taken by persons in public trust, and cause a certificate of his having done so to be registred in the sheriff-clerk's books; and if he presume to act without so qualifying himself, and be thereof convicted before two or more justices of peace, or other judge competent, he shall forfeit the sum of 10*l.* Sterling, the one moiety to his majesty's use, and the other to the informer, and shall suffer imprisonment for the space of six months, unless, or until the same be paid.

45. Persons that were possessed lawfully of any abrogated jurisdiction, retain such lower jurisdiction as they would have had, if such abrogated jurisdiction had not existed; does this save to them the privileges of barony, implied

NOTWITHSTANDING that the heritable jurisdictions of justiciaries, and others aforesaid, are abrogated, yet the persons that were lawfully possessed of the same, still retain such jurisdiction of barony, or other jurisdiction subject to the above regulations, as they should have been intitled to, in case such justiciary, or other jurisdiction abrogated by the act, had never existed. A doubt may here arise, whether, in case a lord or baillie of regality has no separate erection of his lands into a barony, the powers and privileges, reserved to barons in virtue of this proviso, remain with him? For answer, According to the strict acceptation of this saving clause, it may seem, that the jurisdiction of a baron, in the case supposed, is not competent to such lord or baillie of regality, whose jurisdiction is abrogated by this act; because, if the abrogated jurisdiction of regality had not existed, he would not have any of the powers or privileges that belonged to barons,

rons included in that of regality ; so that the rights and privileges of a barony, implied in the erection of lands into a regality, will not avail as to the benefit of this proviso. But if the lands were erected into a barony, as well as a regality, tho' in the same grant or charter, the extinction of the regality, by this act, will not abrogate the privilege of a barony expressly created likewise : and it is thought that most of the erections of regalities were of that kind, conveying severally the powers and privileges of barony and regality, and therefore the extinguishment of the one will not infer that of the other ; and, in such case, the saving clause will have the full effect to preserve to those who were lords or heritable baillies of regality, the powers and privileges of barons. And at any rate, they will still have the privileges competent to all heritors, which, by the present regulations, are not much inferior to those reserved to barons.

It is by the same act ordained, That no letters patent, charter or grant, to be made or granted by his majesty, his heirs or successors, erecting lands into a barony, lordship or earldom, or annexing lands thereto, or under any denomination whatsoever heretofore granted or erected, shall be available in law, to convey to the grantees, or any other person, any greater jurisdiction than for receiving and uplifting the rents and duties from the vassals, and tenants or possessors of the lands and heritages of the proprietors, or for recovery of the multures, or services prestable to their mills ; and all letters patent, charters and grants otherwise made, are declared to be null and void. This seems to be a good rule for ascertaining the jurisdiction of all land-holders in Scotland, who, or their authors or predecessors, had not their lands erected in baronies, or with a clause granting the privilege of Courts and Bloodwits, before the date of this act. And I should think, that those who were infest with such clause, have at present the same jurisdiction that our antient barons now have.

WHEREFORE no new baronies, with even the reserved privileges, can be created, more than regalities, but such as were in being at the date of the act may be transmitted by charters of confirmation or resignation. But these cannot contain a clause of *novo damus* as to the privilege of barony, for that were in effect a new grant. Thus, a new erection of lands into a barony, can import no more, in point of jurisdiction, than as above, but will still carry union of discontinuous lands, and other franchises and liberties that do not concern jurisdiction.

THE jurisdiction and privileges by law vested in, or competent to the corporation or community of any royal borow, whether within or without the royalty of such borow, is saved and reserved entire to them, in the same manner as if the act had not been made. Thus, such royal borows as were sheriffs within themselves, remain in the same state ; and where borows were possessed of any jurisdiction of regality or barony, they retain the same as to the lands subject thereto, except as to the privilege of re-pledging, which is totally taken away and abolished in all cases whatsoever.

THE act contains likewise a proviso, That the same shall not take away or prejudice any jurisdiction, authority or privilege vested in,

46. No new charters, or grants of lands, can be given to any person, with higher jurisdiction than that reserved by this statute.

47. How far old baronies can be transmitted, with a clause of *novo damus*, or new ones be erected with the reserved privileges.

48. The jurisdiction of royal borows within or without the royalty saved, except as to re-pledging.

49. As likewise the jurisdiction of

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burghs of regality and barony is saved; what is the case of such as depended upon the lords of regality and barony. The goods distrained may be appraised at the next borow.

or competent to the corporation or community of any burgh of regality or barony in Scotland, or to the magistrates of any such burgh, which is independent of the lords of regality or barony respectively; except any power or privilege of repledging from the sheriffs or stewarts courts, or any other of the king's courts, and the jurisdiction thereby reserved shall be taken to be cumulative only. It may seem, that the burghs of regality or barony, whose magistrates were dependent on the lord of regality or baron, have not their privileges saved: or, on the other hand, it may perhaps be thought, that they are by that quality enfranchised from their dependence upon such lord or baron; so that, in virtue of this act, they may freely chuse their own magistrates without interposition of their foresaid superiors. But, I conceive, that as such burghs of regality and barony continue still corporations, the baron (and the lord of regality, if he continues a baron) may name the magistrates, as before, to exercise such jurisdiction as is still reserved to him; for that the community is not dissolved, appears from the very next clause of the act, whereby all such burghs are supposed intitled to have a market-cross, to which, if nearest to the ground of the lands whence goods are pointed, the same, or samples, where samples are used, may be carried and appraised; and it is declared by this act, that this shall be as sufficient, as if the same had been carried to the market-cross of the head-burgh of the shire or stewartry. Now, in the judgment of law, a market-cross cannot be understood, without a corporation and jurisdiction for regulating the same, and the markets to be held thereat, and such acts of jurisdiction as are allowed to be expedited at the same. This is a great conveniency to the lieges, that in the diligence of poindings, or distress of goods, the appraising at the market-cross of the burgh next adjacent, is made sufficient in place of the head-burgh; to which, tho' never so remote, they behoved, by our former custom, to have been carried, in order to be there appraised; which was frequently most expensive, and tended to the damage of the goods.

50. Sheriff-deputes, they must be advocates of three years standing, may hold courts in time of vacation of the session; must reside four months in the year in their counties; are disabled to concern themselves in causes within the same.

AND, because the courts of sheriffs and stewarts, by the abolition of the heritable high jurisdictions, must be more frequented than formerly, and that their jurisdiction may be exercised, and justice dispensed to better purpose than before, it is provided, That there shall be only one sheriff or steward-depute in each county or stewartry, who must be an advocate of three years standing at the least, to be appointed by the king, and he is removable by his majesty at pleasure, during the first seven years after the act took place, and thereafter is to be for life, or *ad vitam aut culpam*; and he is impowered to nominate one or more substitutes to hold the office, during his pleasure, for whom he shall be answerable, and who, before they enter upon their office, must, in the sheriff-court, take the oaths appointed by law to be taken by persons in offices of public trust, and which must be there recorded. The sheriff-depute, or his substitutes, may hold their courts at any time of the year, as well during the vacation of the court of session, as during the sitting thereof; and may hold itinerant courts, giving previous notice of the same, to be published at the respective parish-churches within the district for which the same are to be held. And such depute shall reside personally,

nally, at least four months in the year, within his county or stewardry; and he is disabled to advise, plead, or otherwise act as advocate, in any cause arising within the same; and, in case he shall be guilty of any gross misdemeanour, or neglect of duty, he is liable to a summary trial of the same before the court of session, at the suit of his majesty's advocate, or four of the freeholders, intitled to vote in the election of members of parliament for such county or stewardry, and, upon conviction, to be deprived of his office. And that such sheriff or steward-depute, who is presumed to be expert in the law, may not be interrupted in the dispensation of justice, by himself or his substitutes, the principal, or high-sheriff or steward, is debarred from judging in any cause, civil or criminal.

By the same act, for the greater conveniency of the subjects, circuit-courts shall be holden twice in the year, viz. in April or May, and in September or October; and the judges shall continue, by the space of six days, at each place where the circuits are to be held, for dispatch of business. And it is declared lawful for one judge of the circuit court, when his colleague is necessarily absent, to sit and dispatch business. And to these circuit-courts appeals may be taken, to be summarily discuss'd, against any final sentence, or decree of any sheriff or steward-courts, or of the courts of royal borows, or borows of regality or barony, or of any baron-court; within 10 days after such judgment is given, by lodging the same in the hands of the clerk of court, and serving the adverse party with a duplicate thereof: as likewise the judge, in case of complaint against him for gross injustice, is to answer to the same within 15 days. Appeal is lawful in criminal matters, of whatever nature or extent they be, except in cases that infer the loss of life, or demem-bration, which being matters of great importance, are left, at common law, to the review of the court of justiciary. But, in matters civil, only those not exceeding 12 l. Sterling: and this regulation, as to civil causes, is to be in force only for the space of 10 years, after the act took place, and to the end of the then next session of parliament. And, in case such circuit court shall, in cognoscing the appeal, find difficulty, they may certify such appeal to the court of session, in cases civil, or, in criminal, to the court of justiciary, in order to a determination: and the complainer must lodge in the hands of the clerk of court, from which such appeal is taken, a bond, with a sufficient cautioner, to answer and abide by the judgment of the circuit-court, and for the costs that shall be awarded against him, in case he be over-ruled. And it is declared lawful for his majesty, his heirs or successors, by an order in the privy-council, to make a new division and distribution of the circuit-courts. And the court of session is authorised to regulate the fees of the clerk, or other officers of the circuit-courts, or the courts of sheriffs or stewards in civil cases; and the court of justiciary is to regulate the fees of such officers in criminal cases.

THE regulation, as to appeals from inferior judges to the circuit-courts, in criminal cases of lesser moment, is undoubtedly a most wholesome remedy against the erroneous, or perhaps oppressive judgments of such courts; and, as it affords an easy redress to the party aggrieved, so it will be a restraint upon those judges, and oblige them

51. Appeals from sentences of inferior judges, competent to the circuit-courts in criminal causes, except such as infer life or demem-bration; and in civil cases, not exceeding 12 l. Ster. circuits to be holden twice in the year, and may by one judge.

52. Appeals in criminal cases to the circuit-courts is most convenient. As to civil cases, the trial for

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10 years, to which that regulation is limited, will discover how far they are expedient.

them to use circumspection in their procedure, as they may be complained upon in such appeals, if their judgments are grossly iniquous, upon serving them with a copy of the appeal, as above. As to the appeals hereby directed in civil cases, it is no doubt an innovation of our law, and forms of procedure in that respect, our judges of the circuits not having been invested with any jurisdiction in matters civil, at the date of this act; but as it is limited to causes of small importance for a few years, so if, after such trial, it shall be found inconvenient, it may not be continued or renewed. This remedy, by appeal in civil cases, is not exclusive of the other, by suspension or reduction before the court of session, as before the statute, and thereby the party, that conceives himself lesed, will have the judgment of the whole lords upon his case. Experience will show, whether the new method of redress, by this act directed, contributes more to the easy and expeditious distribution of justice than the former course of proceedings, which no doubt the legislature intended, by introducing the same.

53. The court of justiciary may appoint informations upon the relevancy or not, or in any other part of the trial, as they see cause; the expediency of this regulation.

THE court of justiciary is impowered, by this act, after the debate on the relevancy, the minutes whereof shall be taken down in writing, to pronounce their interlocutor thereon, and to proceed to the trial, or to adjourn to a further day, without informations by the parties, as before was always the rule: and the pannel, or party under trial, is to give in to the clerk, the day before the trial, in writing, subscribed by him or his procurator, an account of the facts relating to the matters charged upon him in the libel, and briefly to subjoin his objections or defences. But the court may direct informations to be given in by the procurators for the pursuer and defender respectively, in any part of the trial, where questions of difficulty occur, whether after debate upon the relevancy, or on the import of a special verdict, or on the degree of the punishment, or upon any matters that shall be alleged for the pannel before judgment.

INFORMATIONS upon the relevancy or sufficiency of criminal libels were frequently most useless, *viz.* where it is uncontraverted; and, by the former practice, in such cases, the advocates for the pannel behoved to strain their invention, to find something to be alleged for their clients against it: and, in special verdicts, intricate questions sometimes occur, which may require a full discussion; and a deliberate advising the punishment is likewise frequently necessary, the conclusion of our criminal libels bearing, for most part, in general, *The pains of law*; on which account, after the verdict against the party, the punishment comes to be considered; and it may be difficult to ascertain the kind or degree of punishment that ought to be inflicted upon the pannel convicted; and consequently, in such and the like cases, it is justly allowed to the court to direct informations on these points, as they may still do in matters of difficulty, touching the relevancy of criminal libels in particular cases, as formerly. And, by a later statute, the court may dispense with the taking down in writing the depositions of witnesses, in matters not inferring loss of life, or dememoration^a.

^a 21 Geo. II. c. 19.

No fines, forfeitures or penalties imposed in the sheriff or steward-courts, can by this act go to the sheriff or steward-depute, or their substitutes; but all shares thereof, which heretofore belonged to them, shall accrue to his majesty, his heirs and successors, to be paid in to the exchequer in Edinburgh, and to be levied, as other fines; forfeitures and penalties becoming due to his majesty: and sentence-money is entirely taken away. This is a good regulation, the sentence-money, tho' founded in the civil law, was liable to be suspected as a kind of bribe to the judge, to give sentence in favour of the pursuer, in order to make way for the same. The quantum was regulated by the custom of each court, but ordinarily it did not exceed three pence in the pound Scots. And, since neither fines nor sentence-money go as perquisites to the judges, which formerly was the only consideration they had for their labour, the sheriff or steward-deputes have salaries, that may afford them a competent living, and likewise sufficient to gratify their substitutes. This regulation as to sheriff-deputes, tho' increasing a little the expence to the government, yet, tending greatly to the due administration of justice, will advance the good of the public, and improve our constitution in a high degree; if the measures calculated by the legislature are pursued to good purpose, as hitherto hath been done.

54. No share of the fines goes to the sheriff or steward-depute; and sentence-money intirely discharged in place of these perquisites salaries appointed to them.

By this act likewise, it is declared Not lawful for any person to act as a writer, agent or solicitor, in any business in the court of session, justiciary, court of exchequer, or circuit courts, or to act as procurator, writer, agent or solicitor in any inferior court, until they shall have taken the oaths required by law, to be taken by persons in offices civil or military in Scotland, and subscribe, and cause register the same in the respective courts; on pain of forfeiting 20 l. Sterling for every offence against the act, the one moiety thereof to his majesty, and the other to the informer, to be summarily tried before such respective courts where the same is committed; or before the court of session or justiciary.

55. All practisers in the law, before the court of session, justiciary, sheriff, or steward; or circuit courts, bound to qualify to the government.

AND whereas, by several grants of heritable jurisdictions, lands lying within one shire or stewartry had been disunited from the same, and annexed to another, to the great prejudice, interruption of justice, and inconveniencies of the subjects; all such charters and grants are repealed, and made void by this act, with respect to the sheriff or steward-courts, and the lands disunited are restored and annexed to the shires or stewartries within which they locally lie; and, in case they are interjected between two, they are annexed to that county to the head-burgh of which they are next adjacent. But this restitution shall not alter the case, as to the right of voting for members to serve in parliament, in respect of such lands; or vary the payment of the land-tax or cefs.

56. Lands disunited in erections into heritable jurisdictions, subjected to the sheriff or steward-courts where they locally lay; but in other respects continue as before.

THESE two statutes have introduced no small innovation in our law, to the great benefit of the subjects, and for the public good. The act which takes away ward-holdings, and the new regulations thereby directed, tend greatly to the advantage of the vassals in Scotland, and subject-superiors have no reason to complain. And, as to the other, which abolishes the higher heritable jurisdictions, and en-

57. The statute taking away wardtenure, a most beneficial law; and the other, viz. that touching heritable ju-

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jurisdictions,
likewise a
wholesome
act.

acts new rules touching the manner of administration of justice in inferior courts, it will, in many respects, doubtless, be found a salutary law. Those who were subject to such jurisdictions, are put upon the same foot of liberty and independency with the other people of Britain. And it is farther considerable, that the privilege of repledging, that was competent to lords and baillies of regality, is wholly abolished by this act. This was frequently used to the obstruction of justice, by protecting criminals from the due execution of the law, which now must have its free course in his majesty's courts of judicature. And the inferior courts will be much better regulated than formerly, if the sheriff-deputes shall act a part suitable to their character. And as hitherto there hath been no complaint against any of them, 'tis hoped, that they, and those who shall succeed them in those important offices, shall conduct themselves in the execution thereof, so as there shall never be ground for any.

AN
INSTITUTE
OF THE
LAWS of SCOTLAND
IN
CIVIL RIGHTS.

WITH
OBSERVATIONS upon the Agreement or Diversity between
them, and the LAWS of ENGLAND, &c.

BOOK IV.
ACTIONS.

I HAVE now arrived at the last stage, Actions at Law, whereby Rights Personal and Real are made effectual in a judicial way. These are the third object of law, according to the Emperor Justinian's plan, and therewith he, and the lord Stair (whose example in the main I follow) conclude their institutions. Actions are carried on in the several courts of judicature, which obliges me to a discussion of those, and of the jurisdiction therein exercised. I must however discourse, in the first place, of the High Court of Parliament; since the rules that take place in subordinate courts of justice, in the exercise of their jurisdiction, by the common law, cannot apply to that sovereign court. Nor is it without the verge of my undertaking to treat of the parliament, as concerning the law which relates to Public Right; for even the law, touching private or civil right, receives its final effect by the judgments of the parliament, in the last resort; so that it naturally falls within my present design.

1. Not foreign to the present treatise to discourse of the parliament, which must be done in the first place.

TIT. I.

The High Court of Parliament.

THE Parliament is an Assembly of the King, Lords, and Commons; so that, in a strict sense, it includes the whole Legislative Power of Great Britain, which alone can make acts of parliament; but, vulgarly, it is meant of the Two Houses, the Lords and Commons, as when the king is said to call, prorogue, or dissolve the parliament.

1. The parliament.

SECTION

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SECTION I. *The Constitution of the Parliament of Scotland.*

2. The parliament of Scotland consisted of three estates.

BEFORE the union of crowns, we had our own parliament, consisting of the King and Three Estates, *viz.* the bishops, (in times of episcopacy) with whom the abbots and priors were conjoined, before the reformation, as the first estate; peers and commissioners from shires and stewartries, as the second; and the commissioners from borrows, as the third estate. And after the union of crowns by king James VI's accession to the crown of England, we were governed in the same manner, with this only variation, That, in place of the king in person, he was generally represented in parliament by his commissioner specially vested with that authority. But, sometimes, his majesty was pleased to honour our parliament with his own presence; as king James VI. once did ^a; and his son, king Charles I. two several times, followed the same example; the last of which was in the dawning of the unfortunate troubles and rebellion that infested his reign ^b.

^a P. 1617.

^b P. 1633.
P. 1641.

3. The variation between the constitution of the parliament of Scotland and that of England.

THE constitution of our parliament varied from that of England in this, that all the estates with us assembled in the parliament-house, in a joint meeting, by the majority of which, in ordinary cases, all matters, either in a legislative or judicial procedure, were decided; but still the distinction of the three estates was kept up, as is after mentioned. In England, the lords assembled in one house, and the commons in another, and the bills must have passed each house, in order to the royal assent: and the lords discussed all appeals or errors, without the interposition of the commons. And this is the course of proceedings still in the parliament of Great Britain. Which of the two constitutions was best calculated for the liberties and properties of the subjects, is only a matter of curiosity at this day, since it is past doubt that they are absolutely secured by the present happy establishment. I shall set forth more at large the constitution of our parliament.

4. The parliament of Scotland consisted of three distinct estates, sitting in one house; what if any of them dissented.

THE particular constitution of our parliament, and the variations it received, were as follows: it consisted of three separate estates, as just said. Each estate had its own proper authority; so that, if the majority of any one of the three estates dissented, no bill could pass into an act of parliament, by receiving the royal assent; wherefore, tho' they sat all together in one house, yet they were, in effect, three separate assemblies. Indeed, they commonly voted promiscuously; but if any of the estates had expressly taken dissent against the vote, it could not pass into a law. This we are assured was the case, by a learned lawier, who could not be mistaken ^c. And it was declared high treason to impugn any one of the three estates of parliament ^d, which necessarily supposed that each had a distinct authority.

^c Craig, lib. 1. dieg. 7. § 11.
^d P. 1584. c. 77. P. 1587. c. 33.

5. Upon the revolution, the estate of barons installed in the room of the spiritual estate.

UPON the revolution, indeed, the model of our parliament was altered; for the spiritual estate being removed by the abolition of episcopacy, the commissioners from shires and stewartries (called the Barons or Freeholders) were installed in their room, tho' formerly joined to the estate of lords temporal. Thus, the parliament consisted still of three estates, *viz.* the lords, barons, and burgeses ^e, and each of them had an equal number of members, chosen by themselves, for all committees of parliament; so that the constitution and power of

^e P. 1690. c. 3.

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of the parliament was still the same ; and the dissent of any one of the three estates would have barred any matter proposed from passing into an act. This was no extraordinary innovation ; for, after the reformation, in times of presbytery, the parliament to supply the ecclesiastical estate, renewed the old act^a, allowing the small barons and freeholders to chuse commissioners to represent them, and enjoined them to do so ; for it seems they had neglected it entirely. But, at this time, they were, in effect, declared a separate estate of parliament ; for they were to be equal in number upon the committee of the articles with the borows^b. This was a committee of parliament, which prepared all matters that were to be proposed therein.

^a Ja. I. P. 7.
c. 101.

^b P. 1587.
c. 114.

AFTER restoration of episcopacy, whereby the ecclesiastical estate was received into the parliament, there seems to have been four estates of parliament, rather than three, viz. the Lords Spiritual, the Lords Temporal, Barons, and Burgeses, each of which had an equal number upon the articles^c. Wherefore the act of parliament, after the revolution, restricting them to the above three estates, reduced the parliament to its antient model ; at least as to the number of estates of which it should consist, tho' indeed the spiritual estate was discarded ; and this last was the state of our parliament at the time of the union of the two kingdoms.

^c P. 1663.
c. 1.

A CONVENTION of the estates was likewise in use with us, for imposing a taxation to answer a present exigency, or on other urgent occasions, and they regularly ought to have been convened by the royal authority^d ; but, in case of absolute necessity, they met without it, as for settling the government at the revolution^e.

^d P. 1633.
c. 6. conven.
1665, &c.
^e Conven.
1689.

ORIGINALLY, with us, none had a seat in parliament but those possessed of a freehold of the king. Thus the bishops, abbots and priors, and likewise the peers, sat there in respect of their baronies, all nobility and peerage being of old territorial ; and the other freeholders were all intitled to sit in parliament, and bound to attend^f, till the small barons and freeholders, as a privilege, were exempted from necessity of attendance, and the freeholders of each shire allowed to chuse commissioners to represent them^g.

^f P. 1425.
c. 52.

^g P. 1427.
c. 101.

I MUST here remark, that the great barons, and freeholders that were dispensed with as to their attendance, were at first declared to be such as held lands of the king under 20 l.^h, but thereafter such as were under 100 merksⁱ. The words of this latter statute are (within 100 merks of the extent that now is) so that the new survey has been made between the first and second period ; and this last refers to the new extent, and the other to the old ; and this appears from an express intervening statute^k.

^h P. 1457.
c. 75.
ⁱ P. 1503.
c. 78.

^k P. 1474.
c. 55.

AFTER the small barons and freeholders were indulged to appear by their representatives in parliament, some of them still gave attendance as they might. And it appears, from the records of parliament, that the king was in use to create some of them lords of parliament, which was done while they were sitting members, without any patent : thus, Hay of Yester was created lord Hay of Yester, and lords

6. When the spiritual estate was restored, the Scots parliament consisted, in effect, of four estates.

7. The convention of estates.

8. Antiently, persons intitled to sit in parliament, only in respect of their freeholds.

9. How small barons dispensed with, as to attendance in parliament.

10. The king, of old, in use to ennoble freeholders in parliament.

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Hume and Ruthven, and others, were ennobled in the same manner^a. And this seems to have been the original of personal titles of honour with us, distinct from the territorial titles, which always went along with the lands to which they were annexed.

^a Records of parliament 1473, and 1487.

11. On what title royal borows send commissioners to parliament.

THE corporations of royal borows likewise generally have lands holden of the crown in burgage, and of old none could be a burges but such as had, at least, a rood of land held of the crown within the borow, and paid service therefore, called *Burgagium*^b. And antiently, each particular burges had charters of such lands from the king, as other freeholders, as appears from the records in the reigns of Robert II. and James I. and at this day the magistrates receive vassals in burgal tenements as the king's baillies; and frequently there is an express power in the charter of erection to that purpose. It may justly be thought that this antient usage introduced the privilege of borows sending commissioners to parliament; for their bearing a sixth part of the land-tax laid upon the kingdom could not be a mean to procure them that pre-eminence over other borows, since taxations were of much later invention, and only imposed upon extraordinary occasions; the first of which was only in king James II's time^c; and it was not for a long time thereafter that the quota laid upon the borows was ascertained^d. However, that burthen was the just occasion for indulging the royal borows the many privileges in relation to trade, which they enjoy to this day.

^b Leges burg. c. 1, 53, 119, 137.

^c P. 1489. c. 9.

^d P. 1587. c. 112.

12. The antient manner of publishing our acts of parliament. The care taken in printing them.

THE course followed in publishing our statutes of old was, that they were to be registred in the king's register, and extracts given to each sheriff, who was to publish them at the market-cross of the head-borow of the shire, on pain of deprivation, in case of default, and to give copies of them to the prelates, barons, and borows of his bailliewick (shire) on the expence of the party who desired them^e. Thereafter the clerk-register was ordained, by statute, to make out an authentic extract or copy of our statutes, and to sign the same, and to give it out to a printer whom he should chuse, and who was to have the king's licence to print them^f. But still the acts behoved to be published at the market-crosses of the shire-towns; till at last it was declared sufficient that it be done at the market-cross of Edinburgh, and 40 days was allowed, that the knowledge of them might reach the remote parts of the kingdom, before the expiration of which they were not binding^g. It is to the above ordinance for printing the statutes that we owe the edition of them called the Black Acts, as being wrote in a Saxon character. It contains several statutes, which are left out in the subsequent editions. It may be enquired, why the old acts of king Malcolm, William, Alexander II. &c. were not printed at that time, nor indeed to this day, with the other acts. The true reason of this seems to be, that the old statutes, and our antient laws of *Regiam Majestatem*, and *Quoniam Attachiamenta*, wanted to be revised and put in order, for which purpose a commission had been granted by the parliament once and again^h, but which had not been executed; and besides, they were all wrote in Latin; so that the printing them, before they were translated into English, could have been of little use to the subjects. All this was supplied by a subsequent act of parliament, empowering Sir John Skeen of Curriehill, clerk-

^e P. 1425. c. 67.

^f P. 1540. c. 127.

^g P. 1581. c. 128.

^h P. 1425. c. 54. P. 1487. c. 115.

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* P. 1607.
c. 31. of the
unprinted
acts.
b Vol. I.
note, p. 29.

c P. 1661.
c. 1.
J Stat. Malc.
c. 2. § 1.
Rob. III.
c. 1. § 3.
e Inf. tit.
(clerks)
sect. 2.

f Crawford's
lives of the
officers of
state, p. 2.

g Spelm.
gloss. (can-
cellarius).

clerk-register, to translate and print them^a, which he did accordingly. Wherefore the above circumstance does not derogate from the genuineness of those laws, which I have vindicated elsewhere^b.

THE lord high chancellor, both in virtue of his office, and by special statutes, had the privilege to preside in our parliaments and conventions^c. And it appears, that originally the office of chancery was under his management^d, but which came afterwards to be disjoined, and to be committed to the director of the chancery, as I shall shew hereafter^e. The constant province of our chancellor was the custody of the king's great seal, which was an eminent trust, as importing power to render the king's grants, that were to pass under it as a check, ineffectual, if, on examining the same, he found them against law, or impetrated by subreption or obreption, *i. e.* by concealing the truth, or suggesting falsehoods; in which view the etymon of the title seems to be from such Cancelling. It is said by some^f, that we sometimes of old had both a chancellor and keeper of the great seal at once. In such case the sole business of the chancellor was to preside in the higher courts; for the chancellor, with us, never had, by himself, a judicative power to hold courts of law or equity. This at present, and for a long time since, is the supereminent province of the lord High Chancellor of Great Britain, so far as concerns England; but originally he had no such power, as the learned antiquary informs us, in shewing the several degrees by which his jurisdiction arrived to the pitch at which it now is^g; whereby the lord chancellor, at the head of the law, is, under his majesty, the great safeguard to the liberties and properties of the subjects. The jurisdiction of the court of chancery is, with us, supplied by the powers lodged in the court of session, as shall afterwards appear.

13. The
chancellor
presided in
our parlia-
ments; the
other busi-
ness of his
office.

SECTION II. *The Union of the Two Kingdoms.*

BY the union of the kingdoms of Scotland and England, they are forever joined into one kingdom, by the name of Great Britain, to be represented by one and the same parliament, bearing the denomination of The Parliament of Great Britain.

14. The uni-
on of the two
kingdoms in-
to one.

AN union of the two kingdoms was, in the last age, thought, by some of the great lawyers of both nations, impracticable; at least without the unanimous consent of all the members of both parliaments, after being authorised by their constituents. Thus they reasoned, That the right of the subjects, to be represented in the parliament of their own kingdom, is founded on Dominion and Property; and that, in such case, *Potior est conditio probibentis*, the dissent of any one of the parties interested must save the right of the whole^h. Others again thought, that there could be no union of the kingdoms without an union of the laws. The question was moved among the commissioners named by the respective parliaments, in the year 1604, to treat of the unionⁱ, Whether there could be made an union of the kingdoms, by raising a new kingdom of Great Britain, before there was an union of the laws? This momentous point, by command of king James, then endeavouring an union, was referred to all the judges of England, who unanimously resolved it in the Negative. Sir

15. An union
of the two
kingdoms of
old judged
impracti-
cable, with-
out the con-
sent of all the
members of
each parlia-
ment, and
without an
union of
laws.

h MacKen.
observ. on
P. 1604.

i 1 Ja. I.
c. 2. P. 1604.
c. Un.

Edward

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Edward Coke, the attorney-general, who reports it, being present: for that all the judicial proceedings in England being *Secundum legem et consuetudinem Angliæ*, could not be altered to *Secundum legem et consuetudinem Britannia*, till there was an union of the laws of both kingdoms; and that whatever laws England or Scotland might have, Great Britain could have none till that event^a. This was the resolution in those days, which put a stop to the intended union.

^a Coke 4. inst. cap. 75. P. 347.

16. These arguments refuted from reason and experience, and the example of other states.

BUT those reasonings were too slender and subtile, to have barred the great happiness that was to accrue to both kingdoms by an incorporating union, as by experience is found to be the case. The supreme and legislative powers of two nations, by it, are transfused and united into one common sovereignty. The two becoming one powerful nation, are, by their united force, strengthened against foreign invasions, and forever secured against perpetual wars between themselves, tending to exhaust the blood and treasure of both. The reservation of their respective laws, touching private right, and punishment of crimes, was most necessary and expedient, and could not obstruct the union of the two kingdoms; it being the greatest happiness of a people to be governed by their known laws, adapted to their genius by long usage, thro' a course of many ages. And to attempt to form a new body of laws for accommodating both, was a work of such immense labour and difficulty, that it would have been an insuperable obstacle. And the people of both kingdoms have great benefit by a communication of the rights, privileges, immunities and advantages that belonged to the subjects of either kingdom: wherefore, to require the unanimous consent of all the members of both parliaments, and the advising with their constituents in such case, or an union of laws, was unreasonable, with all due deference to these great men, who, in former times, opposed it. Those learned judges and lawiers might have observed, that in the kingdom of France, the independent states that were united to it, and make up a part of the whole, required no such unanimous consent or union of laws. And divers instances of other kingdoms and states so united, both of old, in the growing state of Rome, and in the later times, occur, where the respective nations retained still their former laws and customs, without any impeachment by the union; and all that was required in such cases, was the consent and agreement of the respective legislative powers.

17. The reasoning of Sir Francis Bacon for an incorporating union, without necessity of an union of laws.

SIR Francis Bacon, who was solicitor-general to king James I. when the question about an entire union between England and Scotland was under deliberation before the house of commons, gave his opinion, That a general union of laws was not necessary for that purpose, nor could be expected. That it was only requisite, that such laws as immediately concerned the being of the commonwealth, as cases of treason, and regulations of trade, should be the same in the united kingdom; but that to make an entire and perfect union of laws, was a matter of great difficulty, and not to be expected. That constant experience teaches us, that *patrius mos*, the law and custom of one's country, is dear to all men, for that they are bred and nourished up in the love of it, and that therefore changes and innovations therein are very harsh and dangerous. That sometimes we see great dispute

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^a Bac. speech in the house of commons, of the union of laws. Id. discourse of the union of the two kingdoms.

dispute and argument touching the alteration of some one law, how much more trouble and disturbance would a change of the body of the law occasion? That the laws are rather *figura reipublicæ* than *forma*, and rather bands of perfection than bands of entireness. That in Guernsey and Jersey, the common laws of England are not in force, and that some provinces of France are governed by the written civil law, and others by the customary law; which diversity of laws, however, is no obstruction to the intireness of their union^a. It is upon the plan of that great and comprehensive genius, that the union of the two kingdoms, about a century thereafter, was happily accomplished by the respective parliaments of both kingdoms; and we find by experience the solidity of his reasoning.

^b P. 1707. c. 7. art. 18.

ENGLAND suffered no alteration in their laws and customs, other than the coalition of their parliament with the parliament of Scotland, into one parliament of Great Britain. And, by the treaty of union, our laws, except such as were contrary to, or inconsistent with it, remain in the same state as before. And those concerning private rights are not to be altered, but for the evident utility of the subjects within Scotland. But, for the greater improvement of the union, these which concern public right, policy and civil government, may be made the same through the whole united kingdom^b. And the protestant religion, and presbyterian church-government, is secured to us by a separate act of parliament. As the same religion, and episcopal government of the church, is confirmed in England by an act of their parliament: both which acts are declared to be fundamental articles of the union.

18. The general nature of the union.

^c P. 1537. c. 40.

By the union likewise, all our courts of justice remain inviolate as before, except the privy-council, which was only to continue till the parliament of Great Britain thought fit to alter it; and the court of exchequer, which was to remain till a new court of exchequer should be settled after the union. Pursuant to this plan, the privy-council of Scotland was abolished, to render the union more complete, it being a natural result from the union of parliaments, that since there was but one great council, (as the parliament is justly stiled in some of our old statutes^c) there should be but one privy-council likewise; the members of which being at his majesty's choice, there could be no difference between Englishmen or Scots, other than as their merit recommended them. And a new court of exchequer was established in place of the former, and upon no worse foot, as having additional powers, and all the powers of our lords of treasury annexed to it, with respect to expediting rights and gifts in the king's name^d. And the courts of regality, &c. were since abolished for the good of the public, as I took notice elsewhere^e.

19. Our courts of justice saved by the union, except the privy-council and exchequer; the first taken away, and the other a new erected after the model of the court of exchequer in England.

^d 6 Annæ, c. 25.
^e B. 3. tit. 10.

SECTION III. *The Representatives for Scotland, in the Parliament of Great Britain; and their Election.*

IN the parliament of Great Britain, the number of the representatives from Scotland, deemed proportionable to our interest in the united kingdom, is 16 of our lords to sit and vote in the house of peers. And 45 commoners, viz. 30 from shires and stewartries, and

20. The number of representatives from Scotland in both houses of parliament.

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15 from borows, in the house of commons^a. Those members of both houses are to be qualified, elected and returned in manner by our old acts, the union-act, and subsequent British statutes directed.

^a P. 1707.
c. 7. art. 22.

21. The election of the 16 peers for Scotland.
The precedence of the Scots peers.

THUS, by the act^b, which is declared as valid, as if ingrossed in the treaty of union, and the British statute relative to it^c, the 16 lords are to be named by the peers of Scotland, out of their own number, to represent them in the house of peers, by open election, at the time and place mentioned in the royal proclamation to be issued for that purpose. Any absent peer may either appoint one of those present his proxy to vote for him, or send in a signed list of the 16 peers for whom he votes; but before giving their votes, or signing proxies or lists, they must qualify themselves to the government, by taking the oaths directed by the statute^d. One that is both a peer of Scotland and England must sign his list by his title of Peerage in Scotland. After the election is made, the clerk-register, or two of the principal clerks of session, appointed by him to attend the election, must, in presence of the peers, make up and sign a certificate of the 16 peers elected, to be returned into the chancery of Great Britain, before the time appointed for the meeting of the parliament. It is declared not lawful for the peers, assembled for the election fore-said, to treat of any other matters, under the pain of premunire, expressed in the English statute^e. If any of the 16 lords, so elected, shall die, or be legally disabled to sit in the house of peers, another lord is to be elected in his room, on the king's proclamation, which is to be proceeded in after the same manner, as in the original election of the 16 peers. And, by the treaty of union, all peers of Scotland, and the successors to their honours and dignities, are declared to have rank and precedence after the union, next and immediately after peers of the like order and dignity in England at the time of the union; and before all peers of Great Britain of the like orders and degrees, that should be created after the union, and shall enjoy all the privileges of peers of Great Britain, except the right of sitting in the house of lords, and privileges depending thereon^f.

^b P. 1707.
c. 8.
^c 6 Annæ,
c. 22.

^d Ibid.

^e 16 Rich. II.
c. 2.

^f Art. 23.

22. The election of the members for counties and borows in Scotland.

By the foresaid Scots statute, the 30 commissioners to the parliament, for the shires and stewartries, are to be chosen, one by each shire or stewartry; except the shires of Bute and Caithness, Nairn and Cromarty, Clackmannan and Kinross, each of which shall chuse one by turns. And, by the same statute, the 15 members for the borows are to be chosen by the delegates of the several classes or districts of the borows mentioned in the statute, and the city of Edinburgh is to send one member to the parliament. Each borow is to appoint a commissioner or delegate to vote in the election of a representative for the district of borows; and where the votes of the delegates are equal, the president of the meeting shall have a casting or decisive voice, besides his vote as commissioner for the borow from which he is sent. The borows preside by turns in the elections. Freeholders and barons meet, and make their elections pursuant to writs from the king, directed to the respective sheriffs, and notified to them for that purpose. And such writs are likewise directed to the sheriffs or stewarts, in order to the election of burgessees, by the borows, within their respective bounds.

MINORS

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MINORS and papists are, by the same act, declared incapable to elect, or be elected for any of the foresaid estates. And none are capable to elect, or be elected to represent a shire or borow in the parliament of Great Britain, except such as were, at the time of the union, capable, by the laws of Scotland, to elect, or be elected commissioners to the parliament of Scotland ^a.

23. Minors and papists incapable to vote.

^a P. 1707.
c. 8.

As all barons and freeholders originally had the privilege to sit in parliament, and were bound to give personal attendance; so, when the small barons, or those under 100 merks of the new extent, were allowed to send a commissioner to represent them, there is no particular qualification mentioned requisite to the electors ^b, and therefore all freeholders of the king were intitled. And the first act that mentions the qualification, as to the extent of the holding, is that which revives the foresaid old act of James I. allowing the small barons to chuse a commissioner to represent them ^c; and in that statute the qualification is declared to be a forty shilling-land of old extent, in free tenandry, (*i. e.* in freehold) holden of the king. And, by a subsequent statute ^d, besides heritors who hold a forty shilling-land of the king, all heritors, liferenters and wadsetters, holding of the king lands of 10 chalders of victual, or 1000 *l.* of yearly rent, (all feu-duties being deducted) were made capable to vote in the election of commissioners to parliament, or to be elected. But the statute 1681 ^e, was the rule at the time of the union, and still is, as explained, and somewhat varied by the British statutes after-mentioned. It ordains, that none shall have a vote in the election of commissioners for shires or stewartries, but those who are publicly infest in property or superiority, and in possession of a forty shilling-land of old extent, holden of the king or prince, distinct from the feu-duty in feu-lands. Or where the old extent does not appear in lands of 400 *l.* of valued rent. That adjudgers shall have no vote during the legal, but only the reverser, and that after expiry thereof, the adjudger first infest, but none of these within year and day of him, shall be intitled, till the lands be divided, that the extent or valuation of their shares may appear. As also proper wadsetters having lands, of the holding, extent or valuation foresaid, have right to vote; as likewise have apparent heirs in possession of such lands, in virtue of their predecessor's infestment. By the same act, liferenters and husbands for the freeholds of their wives, or having right to a liferent by the courtesy, of such lands, are intitled to vote; and, if the liferenter do not claim the vote, the fiar has it, but not otherwise for the same lands. Infestments for relief give no title to a vote; and, I conceive, neither can infestments of warrandice.

24. The qualifications of electors, by the Scots acts.

^b P. 1427.
c. 101.
P. 1503.
c. 78.

^c P. 1587.
c. 114.

^d P. 1661.
c. 35.

^e P. 1681.
c. 21.

It may be a question, how far those authorised by the act 1681, to vote in the election of a member of parliament, and who had not title before, are qualified to be elected, since that statute does not expressly declare them capable to be elected. But, upon duly considering the purview of the statute, I apprehend they are; because the statute does not insinuate any thing to the contrary, but puts them in the same case as those mentioned in the act 1661, who are declared capable to elect, and to be elected. And indeed, if there was any distinction to be made in that respect, all the freeholders, who found their title

25. Are all electors capable to be elected.

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title on 400 *l.* of valued rent, would be cut off from the privilege of being elected; for it is only by the act 1681 that they are qualified, that being introduced in place of 1000 *l.* of yearly rent, which was the former qualification. So that it may be laid down as a rule, that all who are capable to elect, may be elected commissioners for shires.

26. The variations as to the qualifications by the British statutes.

THE variations made by the British statutes, are, 1. The holding lands of the king or prince, to the yearly value of forty shillings of old extent, must be verified by a retour, prior to the 16th September 1681, and that no division of the old extent, made since that period, or to be made hereafter, shall be sustained as sufficient evidence of the old extent. 2. That where one claims a vote on singular titles, he must be inest one year, before the test of the writ for calling the parliament; or, if such election is during the continuance of a parliament, one year before the date of the warrant for making out a new writ for such election^a. 3. By the act 1681, there is only place for the qualification of 400 *l.* of valued rent, where the old extent does not appear; and so, if the old extent of the lands did appear, and was under a forty shilling-land, the heritor had no right to a vote. But this is remedied by the British statute^b, which declares, That lands holden of the king or prince, of 400 *l.* of valued rent, shall, in all cases, be a sufficient qualification, whatever be the old extent.

^a 7 Geo. II.
& 16 Geo. II.

^b 16 Geo. II.

27. The constitution of the court of electors, and procedure in the election.

As to the manner of electing the member, the freeholders that stand on the roll of electors have the only title to vote in the choice of the preses and clerk to the court, for the election of the member, and the roll is to be called over by the commissioner last elected, or, in his absence, by the sheriff-clerk of such county; and, if the vote of any one that is on the roll be refused, or of any one that is not on the roll, be received, the caller of the rolls forfeits the sum of 300 *l.* to the candidate thereby prejudiced. After the preses and clerk are chosen, the meeting proceeds to the choice of the member, and in order thereto adjusts the roll, by adding new electors that apply in due course, or expunging others, to whom objections have been regularly made. And, if the preses shall, in the election of the member to serve in parliament, receive the vote of any person who does not stand on the roll duly made up by the meeting, or refuse the vote of any person that is upon the said roll, he forfeits 200 *l.* in the first case, to the candidate prejudiced by the vote unduly received; and, in the second, to the person whose name shall not be called for, or whose vote shall be refused. In all these elections, either of preses and clerk, or member, in case of equality of votes, the person that presides gives not only his own vote, but likewise the casting or decisive voice^c.

^c D. 16 Geo. II.

28. The penalties of undue practices in the election, and return of the member.

AT the time of the election, any person claiming a vote may be obliged to take the oath of abjuration, the oath of trust, and the oath of bribery, insert in the respective acts, at the request of any of the electors; and, if he refuse any of these oaths, he is to be rejected, and struck out of the roll of electors^d. Any person convicted of wilful and corrupt perjury, or subornation of perjury, is incapable of voting at any election^e. The oath of trust or possession excludes only collusive deeds, conveying estates merely to qualify one to vote at an election,

^d 12 Annæ,
c. 5. et dd.
stat.
^e 2 Geo. II.

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tion, subject to conditions, whereby his title may be defeated. The clerk to the meeting of freeholders, wilfully returning to the sheriff a person not duly elected, is liable in the penalty of 500 l. to the person who ought to have been returned, and was not; and the same penalty is incurred by the sheriff, if he wilfully annex to the writ any false or undue return, to be recovered summarily, on a petition before the court of session, to be presented within one year after the return is made ^a.

^aDd. 7 Geo. II. and 16 Geo. II.

THAT elections of members for shires may proceed regularly, and that all those intitled to votes may be duly enrolled, and such as are not may be deliberately expunged, it is provided, by the statute last referred to, That every freeholder who intends to be enrolled shall subscribe and leave a copy of his claim with the sheriff or steward-clerk, setting forth the names of his lands and titles, whereon he desires to be enrolled, two Calender months before the Michaelmas meeting, to which he is to apply for that purpose; or, otherwise, that he shall not be enrolled. And that whoever intends to object to any person standing upon the roll to have him expunged, in respect of the alterations of his circumstances, as being denuded of his estate, or the like, shall, two Calender months before the meeting, leave his objection in writing with the clerk; and the clerk is to mark, on the back of the claim or objection, the day he receives the same, and whereof he is to give extracts to all that demand them. Where any person, at any Michaelmas-meeting, or meeting for election, shall be refused to be enrolled, or be struck out of the roll, if he conceives himself wronged, he may, within four months thereafter, apply to the court of session, by summary complaint, against the person on whose objection this happened, who is to be summoned thereon to answer on 30 days notice. And, if any person is wrongfully enrolled, it is lawful for any freeholder, standing on the roll, to exhibit a summary complaint against him, to answer likewise on 30 days notice. And, in case the lords shall alter or reverse the determination of the meeting, the clerk, on presenting such judgment, shall forthwith make the alteration in the enrolment thereby directed, on pain of 100 l. to the person in whose favour the judgment was given; and, if the judgment of the freeholders, refusing to admit, or expunging any person from the roll, is affirmed, the complainer shall forfeit to the objector 30 l. with full costs of suit.

29. How one is to be put in the roll of electors, or expunged out of it. The redress in case of injustice.

BECAUSE party-interest frequently occasions factions in borows, in the election of their magistrates and council, which thereafter influences the choice of their delegates; and, by consequence of their commissioner to the parliament, it is provided, by the same late statute, That at the annual election of magistrates and counsellors, and in all the proceedings previous thereto, it shall not be lawful for the minority of any meeting, for election of magistrates, counsellors or deacons, or others who, by the constitution of the borow, may have a vote in the election of magistrates or counsellors, to separate from the majority of those having right to act at such meetings, upon any pretext whatsoever, nor to make any separate election; but the minority shall submit to the election made by the majority of any previous meeting. And, if any person, elected by the minority of such

30. The manner of election of deacons, magistrates and town-council of borows.

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meeting, shall vote in the election of magistrates or counsellors, or in leeting for them, or in any other step of the election, he shall forfeit the sum of 100 l. to any one of the majority of such meeting who shall sue for the same. And no person, elected by the minority, shall presume, upon any pretext whatsoever, to act as magistrate or counsellor; and, if he do, shall forfeit the sum of 100 l. to the magistrates or counsellors elected by the majority, or to any of them who shall sue for the same.

31. How undue elections in borows are redressed.

BUT it is declared lawful to any constituent member at any meeting, for election of magistrates or counsellors, or meetings previous thereto, who shall apprehend any wrong done by the majority, to apply to the court of session, by summary complaint, for rectifying such abuse, or for making void the whole election, or ascertaining the election made by the minority, within two Calender months after the annual election: and the court shall grant warrant for summoning the magistrates and counsellors, elected by the majority, on 30 days notice, and shall summarily determine the complaint, and allow to the party who shall prevail full costs of suit.

32. The election of commissioners or delegates from borows, for choosing the member for a district of borows, and the election of such burghs.

AND at every election of commissioners for choosing burghs for any district of borows, the clerk of each borow shall make out a commission to the person chosen by the majority of the magistrates and council, sign it, and affix the common seal of the borow thereto; and, on his refusal, or making out a commission for any other person, he shall forfeit the sum of 500 l. to the person elected commissioner, and suffer six months imprisonment, and be incapable for ever to hold the said office. And, if any other person, than the common clerk of the borow, shall take upon himself to act as clerk, and to make out a commission to any other person as commissioner, other than the person chosen by the majority, he shall forfeit the sum of 100 l. to the person elected commissioner. It is likewise declared, that it shall be no objection to any commissioner for choosing a burghs, That he is not a residenter in the borow, or That he is no trafficking merchant therein, or has no burgh-lands or houses in it. At all meetings of commissioners for choosing burghs to serve in parliament, the common clerk of the presiding borow shall allow the votes of such persons only who produce commissions authenticated by the subscription of the clerk, and the common seal of the respective borows within the district, and shall return to the sheriff the person elected by the major part of the commissioners; and, on his neglect or refusal, he shall forfeit the sum of 500 l. to the candidate elected by the majority of them. And the sheriff shall annex to the writ the return made by the clerk of the presiding borow, and, on his neglect or refusal, he forfeits likewise the sum of 500 l. to the candidate returned by the clerk.

33. The electors of commissioners liable to take the oath against bribery.

THE electors of commissioners for choosing burghs to serve in parliament, are declared to be within the true intent and meaning of the act^a, imposing the oath against bribery, and to be considered as electors of the member to serve in parliament, to all intents and purposes, and liable to all the provisions, forfeitures, and incapacities, to

^a 2 Geo. II.

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to which persons voting for any member to serve in parliament are made liable by the said act.

THE prosecution for inferring any incapacity, disability, forfeiture or penalty by the act imposed, must be commenced within one year after the same is incurred; otherwise the party shall not be liable thereto^a.

^a 16 Geo. II.

34. Action for the penalties limited to one year.

ON occasion of the late act just referred to, Allowing any freeholder, standing on the roll of electors, to object to the title of any person standing on the roll then last made up, and to apply to the court of session, by summary complaint within a limited time, to have him expunged, divers questions arose, touching the qualifications of electors of members for shires, which received a decision of the court, the most important, of which it is proper to take notice of. But I must premise, that from the foresaid liberty to challenge those standing on the roll, as the same is qualified, *viz.* That, if no complaint shall be exhibited within the time limited, (*i. e.* before the first of December 1743) then no freeholder, who stood on the roll last made up, shall be struck off, except on sufficient objections arising from the alteration of that right or title, in respect of which he was enrolled, it plainly follows, that all persons, against whom no complaint was made or exhibited, must continue for life, tho' their title be ever so defective, unless an alteration in their circumstances happen. But, on their decease, their heirs may be refused to be enrolled; for, by the same statute, no apparent heir shall be enrolled until his predecessor's titles are produced and allowed by the freeholders, as a sufficient qualification for his voting for a member of parliament; on which occasion the freeholders may object to his titles, and, if insufficient, refuse to enroll him.

35. Divers questions touching the election of members for shires resolved. The persons unduly standing upon the roll, not objected to in due time, must continue for life, but their heirs may be rejected.

THE act 1681, which is the standing rule for qualifications necessary to freeholders for voting in election of members of parliament, ordains, as to feu-holdings, That the person claiming a vote thereon must be infeft, and in possession of a 40 shilling-land of old extent, holden of the king or prince, distinct from the feu-duty. This occasioned no small difficulty, Whether the extent should be over and above the feu-duty, or at least exceeding it, so as it might appear not to be the feu-duty: and the lords of session, for clearing the matter, found, That tho' the retour, to which as a full, and indeed the only proof of the old extent, reference is made in the late statute, bear the lands to be worth 40 shillings of old extent, yet that it is not sufficient to qualify the person claiming thereon, where the old retour-duty is of the same amount with the feu-duty^b; for the tenor of the retour does not then distinguish it from the feu-duty.

36. If the feu-duty is the same with the old extent, not good to qualify one a voter.

^b Jan. 19. 1745. freeholders of Lanerkshire contra Hamilton. June 14. 1746. freeholders of Linlithgow contra Cleland.

^c 16 Geo. II.

NEXT, the late act^c declares, That no person shall be intitled to vote for a commissioner to parliament, in respect of the old extent of his lands, unless such extent is proved by a retour of his lands, prior to the 16th of September 1681, which is the day immediately preceeding the date of the act 1681. Now divers retours were produced for founding a title to vote, where the lands were described or denominated a 40 shilling-land of old extent, but either did not bear the

37. A 40 shilling-land of old extent must be proved by a retour preceeding the 16th September 1681, and charters not

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admitted as evidence; no division of it since that time sustained to qualify those having right to shares of it.

the Valent-clause, whereby the inquest ought to have returned both the old and new extent; or it differed from the Descriptive clause, so as not to extend to a 40 shilling-land of old extent: and the court of session found, That the land, being designed a 40 shilling-land of old extent in the descriptive clause, was not sufficient; unless it was supported by the valent-clause, by which alone the inquest return on oath the value or extent of the land; whereas they may be erroneously described in the retour, which it is not the part of the inquest to regard^a. Again, the act declares, That no division of the old extent, made since the 16th September 1681, or to be made in time coming, by retour, or any other way, shall be sustained as sufficient evidence of the old extent. On this clause the court found, That suppose a 10 l. land of old extent had been divided into two halves, since the foresaid period, and vested in different heritors persons, it could qualify none of them for voting; which seems a hardship, but, by the tenor of the clause, there was no avoiding it^b. The statute, as above, refers to a retour, as the only evidence of the old extent. Now several persons produced a series of charters under the great seal, where the lands were designed a 40 shilling-land of old extent; but the lords, in respect of the precise terms of the statute, rejected that proof^c. And indeed it was no better, than if the lands had been so named in the descriptive clause of a retour; for the weight of the evidence is laid upon the inquest's returning on oath the value of the lands, in answer to one of the heads of the brieve to that purpose; and, conform to which, the casualties of the superiority are regulated.

^a Stewart contra Campbel. id. contra Crawford. Feb. 22. 1745.

^b Feb. 6. 1745. Freeholders of Lanerk contra Hamilton. ^c Dd. decis. Feb. 22. 1745.

38. How the want of the extent in the retours supplied.

It appears from the above cases, that divers lands are defective as to the old and new extent, at least, that they have not been retoured of such extent. To remedy that inconveniency, the barons of exchequer, by their ordinance^d, appointed the extent of such lands to be in proportion to that of other neighbouring lands, in the same, or next adjoining county, and to be retoured accordingly. They were intitled to make this rule, by the powers committed to them, in relation to the king's revenue, as being vested with all remedies and means necessary for recovering the same; for, unless that defect were supplied, the non-entry, and relief of heirs entering in lands holden of the crown could not be ascertained. But this cannot be regarded in questions about qualifications of members of parliament, since the extent must be verified by retours preceeding the act 1681.

^d Ord. of exchequer, Cand. term, 5 Geo. II.

39. Are royal borows, or burghs of regality, holding lands, sufficient to qualify private persons to vote, intitled to vote in the election of a member for the shire.

SOME royal borows, and other borows, were possessed of lands holden of the king or prince, sufficient to qualify private persons for voting, and had been in the use of voting in the election of a member for the shire, and stood on the roll; and the question is, if they have a good title? No objection was made against any royal borow in such circumstances; so that it may seem, that they must continue on the roll of electors for perpetuity, since corporations die not. But upon examining the clause in the statute, touching the objections to be made to freeholders, standing upon the roll, within the limited time, and that otherwise they shall continue, till an alteration in their circumstances happen, it will appear, that it concerns only private persons, for those can only be properly called Freeholders, and in them only an alteration of circumstances can be presumed. Wherefore,

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fore, I conceive, that all corporations may be objected to at any time, notwithstanding the foresaid proviso in the statute; at least, a declarator may be insisted in to have them found incapable. And, as to royal borows, it seems plain, that they, being otherwise represented, viz. by the commissioners for their respective districts, cannot claim any farther representation on account of freeholds belonging to them; more than peers could claim votes in the election for shires, in respect of their lands within it, sufficient to qualify any other person. There is this farther objection to them, as well as to all other borows or communities, that they cannot take the oaths, required by law to be taken and subscribed by the electors of members of parliament: hence it is plain, that no communities can claim to vote in such elections. We see that, in the case of commissioners from borows, elected for choosing a burges for the respective districts, the electors of them are to take the oaths, and likewise the commissioners must do it; but no such provision is made with respect to communities claiming a vote in the election of a member for the shire. An objection was made upon this head against the vote of the town of Paisley, which, tho' not a royal borow, holds of the crown lands, sufficient to entitle a private person as an elector, but the complaint was dismissed upon informality.

A FISHING, as valued in the cess-books, was sustained, in order to make up the 400 l. of valued rent, tho' the act mentions *Lands* only. It is a fictitious title, and was rejected, if one convey lands to his eldest son, in order to qualify him for a vote, and take back the property to be holden by him of the son; because, in such case, the son cannot take the oath enjoined by the act 12mo *Anna*^a, touching fictitious titles for creating of voters.

40. A fishing counted in the valuation. A fictitious title rejected.

By a British statute^b, no judge of the court of session, justiciary, or baron of exchequer, is capable of being elected a member of the house of commons. This is conform to the law of England, whereby none of the judges of the king's bench, or common pleas, or barons of exchequer, can be chosen members of parliament^c. None of the clergy can be members of the house of commons^d: nor can a sheriff; because he is the returning officer. And, by the late act, no sheriff-depute can be a member of parliament for Scotland, or sit and vote in an election^e. No person born out of the king's dominions, unless of British parents, shall be a member of parliament, tho' naturalized^f. The eldest sons of peers may be members of the house of commons, for any county or borow in England^g; but the eldest sons of our peers cannot serve for shires or borows here; because they must have their full representation, without incroachment from the estate of peers. By an English statute, no person, having a pension from the crown for any number of years, is capable to be chosen member of the house of commons; and if any person having such pension, at the time of his being elected, or at any time thereafter, shall presume to sit and vote therein, he shall forfeit 20 l. for each day, to such person as shall sue for the same, with full costs of suit^h. Nor can a person attainted of treason or felony be chosenⁱ: all which, doubtless, must hold also with us.

41. No judge of the court of session, justiciary, or exchequer, capable of being elected, others incapable. Are eldest sons of our peers, or persons having pensions for a certain number of years, capable to sit as members of the house of commons?

^a June 19. 1746. freeholders of Aberdeen-shire.
^b 7 Geo. II.

^c Coke 4. inst. p. 47.
^d Coke ibid. p. 48.

^e 21 Geo. II. c. 19.
^f 12 Will. III. c. 2.
^g 9 Annæ, c. 5.

^h 1 Geo. I. c. 26.
ⁱ 7 and 8 Will. III. c. 25. 12 Will. III. c. 2.

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42. Regulations in England as to those capable to elect, or to be elected members of parliament.

It is a rule by our former law, and still obtains in the election of members of parliament for shires, that all who are capable of voting in such election may be elected as above. But, in England, no person can be elected a knight of a county who has not six hundred pounds, for his own use, in lands or tenements, or of some greater interest of annual value within the county: or a citizen or burgher, unless he hath three hundred pounds^a; whereas any person may be an elector of knights of the shire, who has been assessed for lands or tithes to the public taxes, or poors-rates, and paid duties proportionably with others, at 40 shillings *per annum*^b. Other regulations, touching elections in England, are made by other statutes^c. The duty of returning officers, and the remedies against them for their misbehaviour in that respect, are settled in England by an old statute^d, and other later statutes in that behalf, and are much the same as with us.

^a 9 Annæ, c. 5.

^b 10 Annæ, c. 22. 12 Annæ, c. 5. ^c 7 Will. III. c. 4. & 5 Annæ, c. 7. 3 Geo. I. c. 18. ^d 23 Hen. VI. c. 15.

SECTION IV. *Power of Parliament; the King's Prerogative; the Two Houses; and Privilege of Parliament.*

43. The nature and power of the parliament; it continues for 6 months after the demise of the king, unless sooner dissolved by the successor.

THE Parliament consists of the king, and two houses of the lords and commons: and each of them have a negative voice in making laws, and without the joint consent of the king, and both houses, no law can pass obligatory on the subjects; for it is not otherwise an act of parliament. They are one body politic, and corporation, of which the king is the head. All their powers and privileges in the right of them, and title to the same, are entire, and belonging to the whole body of the parliament, tho', in the exercise of those powers, they are, in many things, distributed into parts. All the subjects are intended to be there present, either in person, or by representation, and the consent of parliament is taken to be every man's consent^e. Upon the demise of the king, the parliament in being at the time, or if there was none, the last parliament shall meet and continue for six months, unless sooner dissolved by the next successor; but they have no power to alter the acts establishing the protestant religion here and in England; nor shall any office, civil or military, become void by the demise of the king, but continue six months, unless sooner discharged by the next successor^f.

^e Aitk. arg. of the power and jurisdiction of parl. 14, 34, 41, 51, 55. Arcan. parl. 3. Coke 4. inst. p. 25. ^f 6 Annæ, c. 6.

44. The king in parliament absolute.

THE power of the parliament is absolute and unlimited in Great Britain. The king sitting there, in his royal robes, and politic capacity, is an absolute sovereign; and there is scarce any thing that he cannot then do, with concurrence of the lords and commons, abrogate old laws, make new ones, &c. Statutes of restraint bind not the king, unless they concern the common wealth, or he be specially named^g.

^g Finch, l. 4. c. 1. p. 234.

45. How far acts of the British parliament affect Ireland; the last resort as to decrees in Ireland.

Acts of the British parliament do not extend to Ireland, unless particularly named, or generally included. But, by the statute called *Poyning's Law*^h, all statutes, made in England before that time, are declared to be in force in the realm of Ireland. The house of lords in Ireland have no jurisdiction to reverse any judgments or decrees of the courts thereⁱ. The king's bench in England may reverse the judgments given in the king's bench in Ireland: and the judgments

^h 10 H. VII.

ⁱ 6 Geo. I. c. 5.

ments of the king's bench in England, in such case, may again be reversed by the house of peers of Great Britain.

THE king cannot alter the laws or general customs of the kingdom, or suspend them by his proclamation. However, he may make proclamations for particular purposes, under a penalty, That such as withstand or disobey them shall incur the indignation of his majesty; but the penalty of not obeying them may not be the forfeiture of life, lands, or goods, without an act of parliament authorising it^a. His majesty has prerogative in all things not injurious to the subject^b.

^a Hakwell, mod. ten. parl. p. 20, 21.

^b Finch. l. 2. p. 84.

^c Finch. ibid. p. 83, 87.

THE king has two capacities; a Body Natural, whereby he may inherit his ancestors, and purchase to him and his heirs, in his proper right; and a Body Politic, wherein he may purchase to him and his heirs, kings of Britain; and in this capacity the king never dies, and in law it is said the Demise of the king^c. And therefore summonses, writs, and diligences, do not abate or fall by his demise.

46. The effect of the king's proclamations.

47. The king has two capacities, a natural and politic; in this last he is said never to die.

THE assembly of the lords spiritual and temporal is a most august and illustrious court, not only as a house of parliament, but likewise as a court in the last resort, for errors and appeals; but they cannot exercise any of those powers, unless the house of commons be in being at the same time. Both houses must be prorogued together and dissolved together^d. The lords spiritual, or archbishops and bishops, have a voice and place in parliament, in respect of their temporal baronies, parcel of their bishopricks, and do not sit there as representatives of the clergy^e. And indeed none of the clergy in England are eligible to be knight, citizen, or burgesses of parliament; because they are of another body, viz. of the convocation^f. And our ministers are expressly disabled from being members of parliament^g. However, our clergy have no reason to complain they are not represented in parliament, since those in England are not. The lords temporal in England sit there by reason of their dignities, which they hold by descent, or creation: and our 16 peers from Scotland, on account of their titles, for themselves, and as representatives of the other peers of Scotland, by election to that particular parliament to which they are chosen.

^d Aitk. arg. p. 59. Hakwell p. 84.

^e Coke 3. inst. 30, 31.

^f Coke 4. inst. 47.

^g P. 1587. c. 133.

48. The house of peers an illustrious court, in the last resort; in what capacity do the bishops sit there; no representatives from the clergy, either of Scotland or England, in the parliament.

IT is proper to enquire a little into the origin of the two houses of parliament in England. William the Conqueror established a high court, called *Curia*, or *Aula Regis*, consisting of the principal officers of state, and of those that held land of the crown, whom the king had right to call, as immediately holding of himself, to do suit in his court, and to hear and determine causes. The high Justiciar presided in this court, and the members were the *pares curtis*, or *curia*, and constituted the great Court-baron of the kingdom, in place of which the parliament succeeded^h.

^h Bac. new abr. (courts) 583.

THE more probable opinion is, that the commons were assumed to the parliament by Henry III. who, after his defeating the barons, confirmed the Great Charter of privileges to them, and established a house of commons as a balance to the peerage, to prevent their being too powerful in time coming; which the peers would never have yielded

49. The aula regis, or the king's court, in William the conqueror's time, the origin of parliaments.

50. The house of commons established by king Henry III. as a balance to the

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peerage, after his defeating the barons.

yielded to before he vanquished them*. And it is plain the wife prince Edward I. his son went into this policy; for we find a parliamentary peerage, or house of lords, as also a house of commons, consisting of knights, citizens and burgeses, established by him. Another principal reason for establishing the house of commons was for taxing of the people. Hence we find the true ground why all taxations begin in that house, viz. That they being instructed by their principals, whom they represented, to give for the service of the public what every man could reasonably bear, to vary from those instructions, or to suffer the superior peerage to alter the same, would, as they rightly judged, have been the highest breach of trust in them, to the prejudice of the constituents.

* Cambd. Brit. 13. Dugd. orig. jur. 18.

51. The power of judicature lodged solely in the house of lords, as coming in place of the antient aula regis.

THE true reason why the power of judicature was reserved to the lords house was, That the barons, who constitute this house, were called to the antient *Curia Regis* afore said, and sat there in their own right, and as *pares curiæ*. And as this court had a jurisdiction of determining, even in the first instance, both in civil and criminal causes, especially those relating to great persons, and the king's officers of state, as well as by way of appeal from the injustice of all other courts, so the lords continued to determine the same, and petitions exhibited by private persons, or those presented by the house of commons, called Impeachments: and thus they were still the Dernier Resort, to rectify the errors of inferior judicatories, upon writs of error or appeals^b.

^b Bac. new abr. (courts) 568, 569, 584.

52. Why the peers may vote by proxy; but the commons cannot so vote.

THE reason likewise why the lords may give their votes by proxy, hence appears, viz. because they did always sit in parliament in their own right, and therefore were intitled to make their proxies to vote for them in parliament. But the commons had their seat there only as representing the freeholders: and the socage tenants in the country; and the citizens and burgeses sat there as representing the freemen of their cities and borows; and because they were but proxies they could not constitute proxies; for *Potestas delegata non potest delegari*^c.

^c Bac. ibid. 582.

53. The trial of peers by their peers; how far this privilege competent to the lords spiritual. Impeachments by the house of commons.

A PEER shall be tried by his peers, in indictments of treason or felony; for that is at the suit of the king^d. If a lord spiritual is accused, he is to be tried by an ordinary jury of freeholders; so that, in this respect, he has not the privilege of a peer, even in cases of capital offences*. In these trials, the peers are not to be sworn, but give their verdict on their honour; and the spiritual lords depart the house, making a protest of their right, where the case is of life and death; for, by the canons of the church, they cannot be judges in such matters. In these, and other trials before the peers, for life and death, judgment is given by the lord high steward of Great Britain; but all judgments for misdemeanours are given by the chancellor, and in these last the bishops may sit judges^e.

^d Arc. parl. 70.

^e Selden judicat. p. 45.

54. The origin of the office of lord high steward; none but a

THE office of lord high steward of England was antiently hereditary, but has been granted since the reign of Henry IV. only *pro hac vice*, in order to the trial of a peer, upon an indictment for a capital offence. Antiently the duty of this high office consisted in supervising

^f Ibid. p. 176, 177.

ing and regulating, next under the king, the administration of justice, and all other offices of the realm, whether civil or military; and none under the degree of nobility is capable of such eminent trust^a.

^a Hawk. b. 2. c. 2.

UPON complaints, and accusations or impeachments by the commons, the lords may proceed in judgment against the delinquents, of what degree soever they be. The proof is to be in presence of the commons, and judgment is not to be given but on their demand^b.

^b Seld. ibid. p. 6, 7.

If the king have given land to one and his heirs, to be holden *per servitium baroniae*, he is thereby no lord, till he is called by writ to the parliament^c.

^c Vin. (nobility) 559.

In criminal appeals against peers, which are at the suit of private parties, they shall not be tried by their peers; for appeals of felony, or the like, cannot be brought before the lord high steward, who otherwise is the only judge of peers, in cases of treason or felony. The number of peers at a trial must at least be twelve, and a major vote is sufficient to condemn, if the majority amount to that number^d.

^d Vin. (peer) p. 295.

If a peer is summoned before the king's bench, in a capital crime, and does not appear, he may be outlawed by them. And if he has a pardon, and does appear, he may plead it before that court; but otherwise he must be judged before the high steward, by his peers^e. Where a peer is to answer to a bill in chancery, he may do it on his Honour; but when he is to answer to interrogatories, make affidavit, or to be examined as a witness, he must be upon oath^f.

^e Ib. p. 300.

^f Ibid. 293.

If, during the time of the privilege of parliament, one wants to proceed against a member, he must either prevail with him to wave it; or petition the house where he sits, who, if they see cause, will ordain him to wave it^g.

^g Vin. ibid. 292.

THE archbishops and bishops in England, who are called Lords Spiritual, have right to all the privileges of the temporal barons, that of trial by peers excepted, as above; and an eminent author inclines to think they have that likewise^h. But the case is, the bishops claimed an ecclesiastical privilege, to be only tried by the archbishops as their ordinaries; for that, by being tried by their peers, they would have admitted a temporal jurisdiction. Thus, by non-user of any right of being tried by their peers in capital cases, those bishops, who held *per baroniam*, and consequently had a privilege to have such trial, wholly lost the same, and are tried by a common juryⁱ.

^h Gibson, code, vol. 1. c. 4. tit. 5. c. 6.

ⁱ Dr. Stil- ingf. of the bishops jurisdiction in capital cases, 360, &c. ^k Art. 19.

By the treaty of union^k it is expressly provided, That no causes in Scotland be cognoscible in the court of chancery, or any other court in Westminster-hall; and that those courts, after the union, shall have no power to cognosce, review, or alter the acts or sentences of any of the judicatures within Scotland, or stop the execution of the same. So that there is only place for a review of the acts and decrees of our courts of justice, by an appeal to the house of peers. Such appeal, being

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duly

peer capable of it.

55. The procedure upon impeachments before the lords.

56. Grant of lands per servitium baroniae.

57. Appeals against peers are not competent before the house of peers.

58. What if a peer is summoned before the king's bench. When may he answer upon his honour, or must give his oath.

59. How liberty procured to sue a member of parliament.

60. Are the bishops intitled to trial by peers.

61. Appeals competent directly from our courts to the house of peers; the courts in Westminster-hall cannot intermeddle in the judg-

ments given
in our courts;
in what time
must an ap-
peal be
brought.
The effect of
an appeal.

duly served, stops execution till it is discussed by the judgment of the house, or fallen from by the appellant's not insisting in it. An appeal may be brought against every judgment given during the sitting of the parliament, within 14 days after pronouncing; and, as to judgments given at other times, within 14 days after the down-sitting of the parliament, or otherwise it cannot be received that session. And, by a resolve of the house, no appeal can be entered after the expiration of five years from the date of the extract of the judgment appealed from; unless the party is minor, under coverture, imprisoned, furious, or out of the kingdom; in which cases the appeal may be brought within five years after the disabilities or impediments are removed. At taking out a writ of appeal, bail must be found by the appellant, for the respondent's expences that shall be awarded by the house, in case of affirming the judgment.

THE house of lords may reverse, affirm, or vary the judgment appealed from, as they see cause; and the proceeding in an appeal is According to the law and custom of parliament. And they may interpret any acts of parliament in any cause brought before them, as in their great wisdom they see proper^a. However that high and honourable court determine the causes in the last resort, according to the laws of the respective parts of the united kingdom, where the judgments appealed from were given. If, on particular occasions, the higher house give judgments different from the subordinate courts, in respect of considerations from equity or expediency; the lower courts will think proper to vary their future decisions, in conformity to these of the supreme court, which is always uniform in their procedure. Where one attains possession of an estate, in virtue of a decree, which, upon appeal, is reversed, he is *bona fide* possessor, till the writ is duly served^b.

^a Coke 4.
inst. 21, &c.
Finch 233.

^b Feb. 13.
1734. Lesly.

62. The
king's prero-
gative as to
passing of
laws, pro-
roguing and
dissolving
parliaments;
they cannot
continue be-
yond seven
years. The
effect of a
prorogation,
or adjourn-
ment of par-
liament.

As it is the king's prerogative That no bill, tho' past both houses, shall become a law without his royal assent, so it is his majesty's sole privilege to call, prorogue, and dissolve parliaments. But as, by a former statute^c, no parliament was to have continuance for longer than three years, to be accounted from the day on which, by the writ of summons, the parliament is appointed to meet; so, by a later act^d, the time of continuance is enlarged to seven years, to be accounted as above, unless the parliament shall be sooner dissolved by his majesty. A session of parliament is the whole time of its sitting, from its commencement till it be prorogued or dissolved, tho' continued by adjournments from time to time. By prorogation, every bill, that was not finished by obtaining the royal assent, falls, and must be entered upon a-new, if the promoters of the same still insist. But by adjournments, tho' to a long day, the procedure on depending bills still continues, and may be followed out, and there is no new session. Every several session is, in some respects, a new parliament; but if a parliament is called, and sit, and without any act past, or judgment given, is dissolved, it is no session of parliament, but a convention. If there be divers bills past in one session, whatever time the king gives the royal assent to them, all shall have relation to the first day of the session, and the first day and the last are but one parliament, and accounted

^c 6W. and M.

^d 1 Geo. I.
c. 8.

counted as one and the same day; unless special mention is made in the act when it shall otherwise take place^a.

^a Arcan. parl. 93. Coke 4. inst. p. 28.

It is the privilege of the lords of parliament, That their persons are not only free of arrests for civil causes, while the parliament is sitting, but during their lives; they likewise are intitled to all the privileges those of the house of commons have during the sessions of parliament. The privilege of all members of parliament is, that neither their persons, nor their servants attending them, can be arrested, nor their horses or other goods distrenzieable or attached, during the session of parliament. They are likewise privileged against suits, or attendance on courts, as jurymen or witnesses; they have it *eundo, morando, redeundo*, not only during the session of parliament, but likewise for a reasonable space before and after, for their going and returning; and it is even granted by force of their election, before the return is made^b. But suits may proceed against them immediately upon the dissolution or prorogation of the parliament, or its adjournment for longer space than 14 days. No plaintiff shall be barred by any statute of limitation, nor his suit discontinued for want of prosecution, while his party uses the privilege against him^c. Hence, it would seem, that prescription does not run, nor actions sleep with us, during the privilege of parliament: however, the case being doubtful, the court of session allows diligence to be used against members of parliament, to save against the prescription or limitation of actions, upon a summary application for that purpose^d. Tho' the lords are privileged for their persons, not only during the parliament, but during their lives; yet suits may be carried on against them in vacation times, as is allowed in respect to the commoners.

^b Coke 4. instit. 24.

^c 12 and 13 Wm. III. 11 Geo. II. c. 24.

^d Forbes MS. Nov. 28. 1713. Col. Middleton.

It is in regard to the service of the commonwealth, that the privilege of parliament takes place, and consequently, it should not be used to the danger of the commonwealth. Wherefore, it is not pleadable, either by lords or commoners, against arrests for treason, felony, or breach of the peace, nor against any indictment; for that supposes a breach of the peace. Further, it is always in the power of the parliament, who may proceed against any of their own members, the privilege being a restraint to the proceedings of other courts, but not to these of the parliament itself^e.

^e 2 Rol. 45.

In the case of breach of the privilege, the offender, on complaint to the house, whose privilege is infringed, may be brought to the bar, committed to a serjeant at arms, or to the tower, or otherwise censured for the contempt, as to the house shall appear just^f.

^f Coke 4. inst. 25.

As the king's highest prerogative is, That, by his royal assent, he gives the force of laws to the acts of the two houses, whereby he is in effect the source of the law; so the next in dignity and order is, that he names all the judges *jus dicere*, to apply the law in practice to the several exigencies of the subjects, without which it is but a dead letter; and this he does by himself alone, that being an executive part of sovereignty. Thus, he is the fountain of the jurisdiction exercised in the subordinate courts of justice. And, tho' there were divers jurisdictions of inheritance established with us before the uni-

63. The privilege of the lords of parliament as to the liberty of their persons. The privilege of all members of parliament during its sitting. The time of limitation of actions does not run, nor are they subject to discontinuance, during the privilege.

64. In what case the privilege not pleadable.

65. The consequence of breach of privilege.

66. As the king's assent gives the force of laws to the acts of the two houses, so he is the fountain of jurisdiction; how this understood as to heritable jurisdictions.

on,

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on, and secured by an express article of the treaty^a, yet all these proceeded from the several grants of our kings for the time. And such higher jurisdictions being now either taken away, and their powers annexed to the king's ordinary courts of justice, or reassumed to the crown, upon recompensing the owners, they returned to the fountain whence they sprung. The king's prerogative or privilege, as to debts due to his majesty, shall be considered hereafter, when I treat of the court of exchequer^b. I shall now, according to my plan, proceed to the consideration of the jurisdiction exercised in subordinate courts of judicature.

^a Art. 19.

^b Inf. tit. 11.
The court of exchequer.

T I T. II.

Jurisdiction. Judges.

1. The necessity and expediency of jurisdiction and courts of judicature. A general hint of the method.

MOST people, thro' ignorance, prejudice or self-love, are prone to arrogate to themselves what is not their due, and to derogate from others what is theirs: therefore judges and courts of judicature are necessary, that the law may be put in execution, and justice administered impartially. It is before those courts that Actions at law are brought, whereby our rights are made effectual, when denied or obstructed by others. I shall, in this title, speak of jurisdiction in general, and of courts and judges; and, in the following titles, of their attendants; and of particular courts; and specially of the actions competent before the court of session, with the judicial procedure therein; decrees and execution thereon, or stay of the same, and of matters incidental to the premises.

SECTION I. *The Origin and Nature of Jurisdiction: and its several Kinds.*

2. Jurisdiction, what; it proceeds from the king.

JURISDICTION is "A power of judging and determining questions concerning the rights of parties, and exercising other acts of justice by public authority." It proceeds originally from the sovereign power, and derives all its force and effect from thence. It is the great happiness of those who have subjected themselves to a common authority, under a civil government, that they have their rights and liberties fenced by the sanction of the laws, and that those laws have effect, and receive execution by public authority. Whereas, in the state of nature, and amongst different nations who have no common judge, matters of right must be decided by force of arms, when they cannot be amicably compounded.

3. The king of old exercised jurisdiction in person, both in civil and criminal causes; but the matter was otherwise settled thereafter.

By our old law, the king was not only, in his circuit thorow the realm, impowered to do justice upon heinous offenders^a, but, likewise, it is expressly declared *Lawful to the king to take cognition of all matters that should come before him at his emplaissance*, (pleasure) *like as it was wont to be of before*^b. Wherefore, in those days, the king exercised jurisdiction, both civil and criminal, in his own person; and consequently the act^c, which declares, "That the king, notwithstanding the jurisdictions and offices conferred upon the subjects, may take cognizance of any causes," would seem only to have been a declaration of the antient royal prerogative, or a revival of the same. But whatever

^a P. 1442.
c. 6.

^b P. 1469.
c. 26.

^c P. 1681.
c. 18.

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* Conv. of
estates 1689.
c. 18.
bP. 1690.
c. 28.

whatever had been the antient privilege of our kings, this statute was not without ground complained of, at the revolution, as a grievance^a, the same being an inlet and handle to arbitrary proceedings, and therefore was repealed^b. So that the king ever since could not, on pretence of the prerogative, incroach upon the settled jurisdiction of the courts of judicature, which they have gained by immemorial usage.

It is justly observed by the English lawiers, That the king being intrusted with the whole executive power of the law, no court whatsoever can have jurisdiction, unless it is some way or other derived from the crown. And that it may be argued with the highest probability, both from the nature of the thing, and constant form of all processes in the king's bench and chancery, which is always returnable before the king himself, That, in old times, the king of England in person, often determined causes betwixt party and party. But, at this day, by the long, constant, and uninterrupted usage for many ages, the kings seem to have delegated the whole judicial power to the judges of their several courts: which, by the same immemorial usage, have gained a known and stated jurisdiction, regulated by certain and established rules, which the king himself cannot alter without an act of parliament. And it would seem, (says the learned Mr. Hawkins) That the king could never sit in judgment upon any indictment; because he is one of the parties to the suit. And where it is said in some of the antient histories, that the king sat in judgment at the arraignment of great offenders, probably, it ought not to be intended, that he came as a judge, but as a spectator only, for the greater solemnity of the proceeding^c.

^cHawk. P.C.
b. 2. c. 2.

4. Probably the kings of England, in antient times, judged in person in civil cases, but not in criminal; but, by immemorial usage, the whole judicial power was delegated to the judges of their several courts.

JURISDICTION is variously divided in the civil and canon laws; but I shall take notice only of these distinctions that have any relation to our practice. In the first place, from the manner of executing it, jurisdiction is distinguished into Voluntary, Contentious and Coercive: Voluntary, which is interposed by the consent of parties, or without opposition; as in the case of a married woman's ratifying, upon oath, deeds granted by her, which, as it must be done judicially, may be taken by any judge, tho' she be not subject to his jurisdiction^d. But other acts of voluntary jurisdiction ought to be before the judge competent; as the authorising tutors or curators, confirmations of testaments, and summary decrees of registration proceeding on the party's consent in the clause of registration; as likewise acts of banishment of a party on his own consent, when under a criminal prosecution. Contentious or Compulsory jurisdiction is exercised in actions at law, where there is pursuer and defender, and whereby, in consequence of decrees upon citation, parties are compelled to do justice to one another. Coercive jurisdiction, is that which is exercised, in judging and punishing of crimes and misdemeanours, in pursuance of vindictive justice.

^dFount. Feb.
3. 1656.
Cochran.

5. Jurisdiction distinguished into voluntary, contentious, and coercive; the nature of these respectively.

FROM the subject-matter of jurisdiction, it is either Civil, Criminal, or Mixt. Civil, concerns only actions relating to civil rights; thus, the lords of session have only a civil jurisdiction regularly, there being some few cases excepted. Criminal jurisdiction is exercised in

6. It is either civil, criminal, or mixt.

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the trial and determination of criminal cases, as that of the court of justiciary, and is the same with what I just termed Coercive. Mixt extends to both civil and criminal cases; as the jurisdiction of sheriffs, and magistrates of borows, and formerly lords and bailies of regalties, before their jurisdiction was abolished^a. Barons have likewise still such jurisdiction in smaller matters, tho' it is much abridged by the late statute just quoted.

^a 20 Geo. II.

7. Judges vested only with a civil jurisdiction, have power to punish for contempt to the court.

It is to be observed, That even those judges, who are only vested with civil jurisdiction, have an inherent power to punish such as offend their jurisdiction, by contempt of their authority, or doing indignities to themselves in a judicative capacity, or otherwise molesting or maltreating the members of court in the exercise of their office, invading or injuring the parties that are in suit before them: they may likewise censure or punish those who misbehave in their respective offices before them. In this case they judge not in their own cause, but in defence of the public character wherewith they are invested, the dignity of the court, and security of administration of justice^b. This coercive power relating to offences done to the judge, or other members of court, or parties concerned therein, is implied in the nature of all jurisdictions; for, *Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potest*^c, where a power is granted, every thing necessary for expediting and executing it must be intended.

^b L. un. ff. si quis jus dic. non obtemp. l. 2. ff. de jurisd. ^c L. 2. ff. de jurisdict.

8. Jurisdiction is either ordinary, delegated, or prorogated: the two first exemplified from the canon law.

JURISDICTION, from the quality of its origin, is either Ordinary, Delegated, or Prorogated: Ordinary, is That which is competent to judges in virtue of their office, and in their own right by their creation. Delegated, is That which is exercised by others than the judge ordinary, by delegation or commission. We have the terms, Ordinary and Delegated Jurisdiction, from the canon law, where the bishop of the diocese is termed the Ordinary; because he has ordinary jurisdiction, in matters ecclesiastical, within his diocese; and in all our old statutes the bishop is always called the Ordinary^d. And a judge delegated, is one That has a power committed to him by the pope to judge in particular causes, exclusive of the ordinary; *Vices nostras geret delegatus*, says the pope, on such occasions^e: by which means he encroached exceedingly on the jurisdiction of the ordinaries.

^d P. 1469. c. 30. P. 1503. c. 64, &c.

^e Tit. extra de off. jud. del. per totum.

9. The judges ordinary, who, of old.

ALL civil actions are ordained to be decided "by the judges ordinary, viz. the Justice, Chamberlain, Sheriffs, Barons, Magistrates of borows, and other judges of the law, to whom these actions pertain," as the statute expressly bears^f. Those are called the Judges Ordinary, in contradistinction to the old court of the lords of session, as appears from the same act; for that consisted of the chancellor, and certain persons of the three estates to be deputed by the king, and to sit where he pleased^g. They are called, in the just mentioned act, the Lords of the King's Council, a denomination frequently given them in these days^h. Wherefore, all judges that have a fixed and determinate jurisdiction, in virtue of their office, are judges ordinary. And the justiciar, or justice-general, (called, in the just quoted statute, the Justice) was the principal judge ordinary, and in

^f P. 1487. c. 105.

^g P. 1425. c. 65.

^h Spotisw. abstract out of the antient records, p. 361, in fin.

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in those days determined in most civil actions, as well as criminal, as is plain from that act; and that few causes, in the first instance, were then competent before the old court of the lords of session. But the present court of session afterwards established for all civil causes in the justiciar's place, and in the room of the old ambulatory court of the lords of session: and the court of justiciary, which succeeded the justiciar in criminal matters, are the superior courts ordinary respectively. As to the Chamberlain, who is mentioned next to the justice, he was superior judge ordinary, in matters concerning the royal borows, as shall appear in the proper place^a. The other judges mentioned in that statute are the inferior judges ordinary.

^a Inf. tit.
the borow-
court.

THE old court of the lords of session acted by a delegated power from the king and parliament; but the Daily Council that immediately succeeded that court was a superior ordinary court of justice; for they had a fixed jurisdiction, and were to sit in virtue of their office, and had the same power as the lords of session who preceeded them, as the act establishing that court expressly bears^b. The court of Commission for tithes, when a committee of parliament, acted by a delegated power^c; but the court of session, now vested with that jurisdiction, is even in that capacity an ordinary court of justice^d. The justices of peace act by a delegated jurisdiction, viz. by the king's commission vesting them therewith, and divesting them of the same, at pleasure.

^b P. 1503.
c. 58.

^c P. 1621.
c. 5.
^d P. 1707. c. 7.

10. Courts by
delegation.

THO', in these antient times, Barons came under the denomination of judges ordinary, yet at this present they can hardly support that character, their jurisdiction being so much limited, as shall hereafter appear, when I discourse of them. And therefore, when any matter is remitted to the judge ordinary, I conceive, that the sheriff or steward-depute of the county, or magistrates of borows; or if it is a maritim cause, the admiral; and, if consistorial, the commissar must be understood.

11. Who un-
derstood
judges ordi-
nary at pre-
sent.

THE commission or delegation of judicial power, concerns either the whole jurisdiction, as in the case of deputies and substitutes; or a particular act or branch only, as in commissions, to take the depositions of parties, or witnesses in causes depending before the judge ordinary. In civil cases, a power of deputation is ordinarily given to sheriffs, and other inferior judges in their commission; and in that to the depute to create a sub-depute, who is called a Substitute, and without such power deputies or substitutes could not be made. But in heritable jurisdictions such power is inherent to their rights, and every judge is answerable for the malversations of his depute or substitute; but criminal jurisdiction cannot regularly be delegated^e.

12. In dele-
gation, either
the whole
power com-
mitted to an-
other, or only
part of it.
May judges
create de-
putes or sub-
stitutes.

^e L. 1. ff. de
offic. ej. cui
mand. est
jurisd.

THE macers before the lords of session act by a delegated power, when they judge in serving heirs in special: for it is either by a remit of the lords of session, on an advocacy of the brieve from the judge ordinary, or on a commission to them from the king, or in the king's name, issued by the director of the chancery, in pursuance of an ordinance of the lords, on a bill or petition for that purpose, by the party intending to serve, representing the grounds whereupon the service ought

13. The mac-
ers some-
times act by
a delegated
power.

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ought to be carried on before the macers, *viz.* intricacy of the questions that may occur, or the lands lying in several jurisdictions, &c. By this commission they are created by the king Sheriffs in that part, *i. e.* within the bounds where the lands ly; and, in order to the expediting such service, they have the same jurisdiction that would otherwise have been competent to the sheriff. This takes place in virtue of the cumulative feudal jurisdiction, always reserved to the king in grants of jurisdiction, and that in serving heirs in special is plainly feudal.

14. As likewise do messengers.

MESSENGERS acted by a delegated power in apprisings. They had a commission from the king for that purpose, in the letters of apprising, as sheriffs in that part; for originally these diligences behoved to be carried on before the sheriff^a. And, at this day, they act as sheriffs in that part, in poindings, which originally was likewise the sheriff's business^b, and on that account they officiate as judges.

^a P. 1469. c. 36.

^b P. 1491. c. 30.

15. Women must exercise jurisdiction by their bailies.

WOMEN invested with an heritable jurisdiction, can only exercise it by commission or delegation to others, as their bailies; women being incapable to act by themselves, in matters of jurisdiction, as deemed unsuitable to the modesty of the sex.

16. Prorogation of jurisdiction: this either with respect to the defender's person, or to the cause; no prorogation allowed as to causes before baron courts, beyond the value in the act, 20 Geo. II. The penalty of registering in an incompetent inferior court.

As jurisdiction is delegated by the act of those to whom it primarily belongs, so, in particular suits, it may be competent, by the deed of the parties, to a judge to whom it could not otherwise belong. This is termed Prorogation of Jurisdiction. A jurisdiction is prorogated, When a party that is not subject to the jurisdiction submits himself to it, either by express or tacit consent: the first happens, when, by a clause of registration, the party consents to a decree's being interposed against him before particular judges, to whom he is not otherwise subject, without which consent, the decree, and all the diligence that follows upon it would be void. This occurs likewise, when an executor confirmed, and his cautioner, enact themselves in the commissary-books, to answer before that court in any suit, at the instance of those interested in the executory: and in every other case, where one expressly submits himself to an incompetent jurisdiction. A tacit prorogation is, By comparing before the incompetent judge as defender, and entering upon the cause, without proposing a declinature of the court; and much more by a pursuer's bringing his suit before such judge. Prorogation is either With respect to the person of the defender, when he, who is not otherwise subject to the jurisdiction, submits to it, by not declining the judge; as, where the defender lives within another county than that where he is sued, and answers to the suit, by entering upon the merits of the cause^c; or With respect to causes. This takes place, where one's jurisdiction is limited as to the extent of sums, concerning which he can judge; but, by the consent of parties, he may judge in cases exceeding that sum. Thus the commissar-court is limited in civil causes to sums within 40 *l.*^d but which, by acquiescence of parties, regularly may be exceeded. But, if the judge intirely wants jurisdiction in such kind of causes, the consent of parties cannot endue him with it, for then private persons would confer jurisdiction, which is impossible^e. There is an exception from the rule, touching prorogation, in the case of barons,

^c Feb. 23. 1627: Service.

^d Instructions to the commissars, Feb. 20. 1666. ^e L. 1. l. 2. l. 16. § 1. l. 74. § 1. ff. de jud. l. 3. c. de jurisd.

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rons, or other free-holders, who cannot even, by consent of parties, judge in causes of greater importance than these to which they are limited by the late act ^a.

^a 20 Geo. II.

IT is a maxim, that *Primus actus judicii est judicis approbatorius*, the first judicial act, at the suit of the defender, infers his approbation of the judge's competency; for one cannot insist for the judgment of the court, without acknowledging its jurisdiction. But a defender may, after his declinature is proponed and repelled, insist on his defences in the cause, Adhering always to his declinature, and may thereafter advocate the same to the superior court, if he finds it advisable, even upon the grounds of declinature ^b: however, it is the judge's part to decline himself; a defender not being bound to appear before an incompetent judge; and if he pronounce decree in absence, it is void ^c.

^b Fount.
July 29.
1696. Schaw.

^c L. ult. ff. de
jurisd. l. 53.
§ fin. ff. de re
judic.
^d D. par. c. 34.

IN the 1693 a commission was appointed by parliament ^d, for making farther regulations of judicatories, in order to perfect the regulations 1672, which, when made and approved of by the king, were declared to have full effect. Those commissioners were authorised to set down rules for inferior judicatories, as to the competency and nature of their jurisdiction, that the lieges might not be at an uncertainty in that respect. They made divers regulations in the 1695 and 1696, which were approved of by the king, and took place, but did not settle the competency of jurisdictions of inferior judges; so that the penalty in that statute, founded on the rules that were to be made, and the judges being liable to the damage of the party grieved, and an arbitrary punishment, for exceeding the limits of their jurisdiction, cannot be imposed in virtue of the statute; but, by the common law, if the procedure of the judge is gross, he is no doubt liable, in that respect, to the party's damage. The competency of the respective courts will afterwards appear, when I discourse of them severally. In the mean while, I shall only observe, that, if a judge gives sentence in a matter not within his cognizance, it is void, except where prorogation takes place ^e. The grounds whereupon a judge may be declined, in particular cases, shall be mentioned hereafter.

^e L. ult. ff. de
jurisd.

17. The import of the maxim, *Primus actus judicii est judicis approbatorius*.

18. How far the commission in 1693, for making further regulations of judicatories, took effect. Decrees before incompetent judges void. How judges punishable, who assume jurisdiction in causes to which they are not competent.

A DISTINCTION of jurisdiction with us, and in many other countries, but not known in the civil law, is That whereby it is either Heritable, For life, During pleasure, or For a limited time. Heritable jurisdictions, as constabularies, regalities, and some sheriffships before the late act, baronies and lower jurisdictions, and some heritable admiralties, may be termed Feudal and Territorial; because they not only go to the heirs of the person interested, but likewise follow the subject, and go to singular successors, so that this jurisdiction is truly Patrimonial. It is annexed to the baronies, lordships, or other territories, and is of course renewed in the charters from the crown to singular successors. But the higher jurisdiction of a baron could not be transmitted by subaltern infestments in the lands, *viz.* those to be holden of the granter; only, there is inherent to the meanest feudal holding, with us, a power to hold courts for the rents. Jurisdiction in bloodwits, or petty delinquencies may be communicated by

19. Jurisdiction, either heritable, for life, during pleasure, or for a limited time. Heritable jurisdiction may be termed Feudal or Patrimonial. There is inherent in all feudal-holdings a power to hold courts for rents. That for petty delinquencies communi-

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cable. The higher heritable jurisdictions abolished.

subaltern infestments^a. The criminal jurisdiction of barons is limited by the late act; and the other heritable jurisdictions, of a higher kind, being inconvenient to the free execution of justice, such constabularies, regalities, bailliaries and admiralties, as belonged to the persons attainted for the rebellion 1715, and thereby forfeited to the crown, are suppressed and extinguished, and so to remain in all time to come; nor can any such new jurisdiction be erected in place of them; and such heritable sheriffships and stewartries forfeited are annexed to the crown, and can only be granted thereafter during pleasure^b. And, for the same reason, constabularies, regalities, and their bailliaries and stewartries were abolished, and all heritable sheriffships and stewartries re-assumed to the crown by the foresaid late statute^c, concerning which, I have treated at large in another place^d.

^a Decem. 12. 1665. Cranston.

^b 2 Geo. I. c. 20.

^c 20 Geo. II. d. B. 3. tit. last.

20. Heritable jurisdiction, how acquired or lost by prescription.

HERITABLE jurisdiction, which is territorial, may be acquired by the positive prescription, together with, and as lands to which it is incident or annexed may. Thus, in various instances, regalities, and heritable sheriffships, granted otherwise than in the terms of the old statutes^e, were found to be secured by the positive prescription, and intitled to a recompence^f. And such jurisdiction, as is communicable to subjects by subaltern infestments, may likewise be acquired by prescription, as at present all the jurisdiction that remains with a baron since the late statute^g is. As to losing jurisdiction by the negative prescription, lords and baillies of regalities, in numerous cases, were found to have lost, in that manner, their jurisdiction over the lands in other mens property subject thereto, by discontinuance of the exercise of it for 40 years, and that they were not intitled to any recompence, upon abrogation of the same, pursuant to the above quoted act^h, which judgments were conform to a pretty old precedentⁱ. For a privilege over other mens lands may be lost by non-user, and the parties, formerly subjected to such jurisdiction, prescribed a freedom from it, and became subject to the sheriff's jurisdiction where the lands lay. But such jurisdiction over one's own property-lands cannot be so lost^k; for one's forbearing to use his right cannot forfeit him of it.

^e P. 1455. c. 43, 44. f Jan. 12. 1748. duke of Douglas, &c. ^g 20 Geo. II.

^h Feb. 28. 1748. Hamilton, &c. ⁱ Nov. 23. 1671. Roland.

^k Feb. 5. 1748. dutchess of Gordon.

21. Jurisdiction for life.

JURISDICTION for life, is That which continues during the natural life of the judges, *Ad vitam aut culpam*, and implies always good behaviour, viz. *Quamdiu se bene gesserint*, even tho' it were not expressed. Thus the lords of session and justiciary, and barons of exchequer, are for life.

22. Sheriffs and justices of peace vested with jurisdiction during pleasure, and magistrates of borows for a limited time.

JURISDICTION, During pleasure, is That which belongs to an office that may be recalled at the will and pleasure of the granter: thus, at present, all sheriffships are of this kind; and the justices of peace have their commissions only during the king's pleasure. Magistrates of burghs are for a limited time. The provost can only continue for two years together, and the baillies only for one: this last is prescribed as the rule, with respect to all magistrates and counsellors of burghs, That they shall not continue farther than one year^l. But usage and custom has prevailed otherwise as to the provost of Edinburgh, and other burghs; but he may be changed after the first year. And the counsellors continue, or are elected, according to the constitution or sett of the respective borows.

^l P. 1469. c. 29.

AGAIN,

TIT. II. The Origin and Nature of Jurisdiction, &c. 475

AGAIN, from the different nature and degree of jurisdiction, it is distinguished into Supreme, Superior, and Inferior. In a most proper sense, the parliament, and particularly the house of peers, is a supreme and sovereign court; for to them is the last resort by appeal. The courts of session and justiciary are superior courts; for they review and reduce the decrees of inferior courts, and the court of session may even review their own decrees. The court of exchequer is likewise a superior court. But it is only in an improper sense that any of these courts is sometimes called Supreme.

23. Jurisdiction distinguished into supreme, superior and inferior; the parliament, the only supreme court. The superior courts.

THE high court of admiralty is declared a Sovereign Court; not without some impropriety. It is a superior court as to causes maritime; for it may reduce the decrees of inferior admiral courts, and review its own. But, in another sense, it is inferior and subordinate to the court of session, which may suspend and reduce the decrees of the court of admiralty, in civil cases; but there is no advocacy from them of maritime causes^a. In like manner the commissars of Edinburgh may, in some sense, be termed a Superior Court; because processes of divorce for adultery must come before them in the first instance, and cannot be advocated from them in order to decision, but may, to obtain a remit, with instructions, and they reduce the decrees of inferior commissary-courts. But then their judgments and decrees, being subject to review in way of advocacy or reduction, before the court of session, they are, in that respect, inferior courts. So that the high court of admiralty, and that of the commissars of Edinburgh, have a mixt jurisdiction, partaking both of the nature of superior and inferior courts. The commission for plantation of churches is a superior court, in the same manner as the court of session, in whom the jurisdiction is now lodged. And indeed, originally, that court was a commission or committee of parliament, and then was a Supreme court.

24. The high court of admiralty, and commissars of Edinburgh, of a middle nature.

THE general assembly, in the most proper sense, is a superior court; for their decrees and sentences, in matters spiritual or ecclesiastical, are not subject to review in any other court; and they review by appeal the judgments of presbyteries and synods.

25. The general assembly a superior court.

ALL other courts are Subordinate and Inferior; only the judgments of justices of peace are declared final, by express statutes, in some particular cases relating to the public revenue.

26. Inferior jurisdictions.

LASTLY, Jurisdiction is either Cumulative or Privative. Cumulative (which may be termed likewise Concurrent) is that which is competent to several judges, and the one may prevent the other by the first citation or attachment: thus, sheriffs and barons have a cumulative jurisdiction over persons living within the barony, as to matters cognoscible in baron-courts: and sheriffs and magistrates of borows have a concurrent jurisdiction as to inhabitants within burgh, even where the borows are sheriffs within themselves; for that is not exclusive of the sheriff's jurisdiction, but only co-ordinate with it as to points wherein other borows, not sheriffs within themselves, have no power of judicature. In such cases the judge, who prevents, is intitled to cognosce; but if he is tardy, the other may proceed:

27. Jurisdiction is either cumulative, in which prevention takes place, or privative. Instances of the cumulative; the superior has a cumulative jurisdiction with his vassal; in this sense the king still has it, not-

^a P. 1681.
c. 16.

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withstanding
the repeal of
the act 1681.

ceed : and tho', on a delinquency, the procurator-fiscal of the one court first sue the offender for a fine, yet that will not hinder the party injured to insist for his damages before the other judge^a; for he cannot, by the proceedings of any fiscal, be excluded from such election, as to his own interest.

^a Jan. 30.
1622. Stuart.
Nov. 9.
1672. Scot.
Gosf. July 1.
1673. Fork.

ALL feudal jurisdiction, granted by any superior, is understood to be cumulative, and not privative, and the king had a cumulative jurisdiction, formerly declared to belong to him by express statute in all cases, but which is now rescinded^b. It would seem that, notwithstanding the repealing act, the king had still a cumulative territorial jurisdiction; so that he might have erected lands in a regality within the bounds of an heritable sheriffship, when such existed, or a borow royal within the bounds of a regality; (tho' now, after abolition of those jurisdictions, there is no place for the question) for such power belonged to the king before the statute 1681, and consequently the repealing that act could not abridge it. And indeed the origin of the constitution of sheriffs was, that the heritable lords or earls, called *Comites*, abusing their jurisdiction, the king, on complaint of the commons, appointed sheriffs to judge in their room, hence called *Vice-Comites*^c, as being surrogate in the vice and room of those lords and earls. I have spoken elsewhere of the superior's cumulative jurisdiction^d.

^b P. 1681.
c. 18.
P. 1690.
c. 28.

^c Craig, dieg.
12. ff. 14.
^d B. 2. tit. 3.
§ 90.

28. Privative
jurisdiction;
what courts
vested with
it; the case
of statutes
appointing
causes to be
tried by a
particular
court.

PRIVATIVE Jurisdiction may likewise be termed Peculiar, and is That which belongs particularly to one judge or court, exclusive of all others: thus, the lords of session have a privative jurisdiction, in competition of heritable rights, and in some other cases. The lords of justiciary have the sole jurisdiction in the four pleas of the crown, viz. Willful Fire-Raising, Ravishing of Women, Robbery and Murder, with an exception as to murder, if the criminal is apprehended and judged within three furs, by sheriffs, or other inferior judges having capital jurisdiction^e. Lords of regality had indeed, for most part, in their charters of erection, power of judging in those; but that was in virtue of such privilege contained in their special grants, without which, I conceive, they could not have claimed the same, and now their whole jurisdiction is abolished, as often before observed. The court of exchequer is invested with the sole jurisdiction in the king's revenue, and divers other matters relating to the public^f. The commission for plantation of churches, and valuation of tithes, has the sole cognizance of these and other matters within their jurisdiction^g. Maritime causes are peculiar to the court of admiralty in the first instance; as are consistorial cases to the commissary-courts. It is to be observed on this head, that where statutes are only Affirmative, appointing causes to be tried in a particular court, without the words (and not elsewhere) they may be cognosed before the judge-ordinary; for such acts do not confer a privative jurisdiction. Church-judicatories have a privative jurisdiction in settling parish-ministers, and in matters relating to the discipline of the church and ecclesiastical censures.

^e P. 1695.
c. 4.

^f 6 Annæ,
c. 25.

^g P. 1707.
c. 9.

SECTION

SECTION II. Competency of Jurisdiction. The Means of executing it.

THE authority of any judge regularly can only have effect against persons living within his territory, *i. e.* the bounds within which he may exercise it; or those having effects or estate there, tho' residing abroad. And in order to affect such goods or estate, a citation, before the court of session, at the market-cross of Edinburgh, and pier and shore of Leith, is sufficient, by our custom, against those without the kingdom. If the principal party lives within the territory, others, For their interest, may be called by letters of Supplement, *i. e.* writs in the king's name, under the signet, for citing them. Wherefore the judge of the territory of the defender's residence is competent for judging him, whether in contracts or crimes^a. Indeed the place of the contract is so far considered, that the solemnities of it, or exceptions against the same, are regarded according to the laws of the country where it was entered into, or the obligation accrued, if the action is sued elsewhere, as I have formerly shown^b.

29. The competency of jurisdiction, in contracts and crimes, is founded in the defender's residence. Persons residing abroad, how subjected in order to reach their effects here. How far the place of the contract is regarded.

^a L. 19. l. 20. ff. de judic.

^b B. 1. tit. 1. § 76, &c.

^c L. 3. ff. de off. præf.

^d L. 7. ff. de cust. et exh. reor.

^e P. 1426. c. 91. P. 1491. c. 28.

^f B. 2. tit. 3. § 98, &c. ^g 20 Geo. II.

THE place where the crime is committed is competent for judging the criminal, if he is there apprehended^c, but not otherwise. Transmision of criminals does not take place between different sovereign powers; but in the same nation it may obtain between several judges, having a concurrent jurisdiction, which was the law among the Romans. Thus, by the rule in the civil law, where an enormous crime, as murder, was committed in the territory of another judge, than where the criminal resided, he was to be remitted by the judge of the place of his domicil, to the other, to be judged and punished there; that serving best for example to the public, and solace to the friends and relations of the persons murdered^d. And, in conformity to this rule, it was ordained with us, by special statutes of old, That the sheriffs of the respective counties thro' which a manslayer passed, should take course to seize and transmit him to the sheriff of the place where the crime was committed, to be there judged^e. But, till of late, there was an exception from this rule by our law, as it was constantly holden, *viz.* That one who lived within a regality, committing a crime elsewhere, must, on the request of the lord of regality, or his baillie, have been delivered over to him by the other judge, who had arrested such offender, in order to trial, that the territorial jurisdiction might be maintained inviolate. This was called Replegia-tion, of which I have treated in the proper place^f: but it is now wholly taken away, as inconvenient, by the late act^g.

30. The competency in criminal jurisdiction, how founded,

ONE may likewise be subjected to jurisdiction on account of the situation of the thing in question, belonging to him, and attached by others, *Ratione rei sitæ*; as in a forthcoming of moveables pertaining to a foreigner arrested here, and in poindings of the ground, with respect to lands; and the principal debtor, either living in another county, or out of the kingdom, is sifted on letters of supplement. Jurisdiction is also founded by prorogation, as above. The case of a woman ascertaining her state here, and that of her children, by proving her marriage with a man that had deserted her into a foreign country, may be referred to this head^h.

31. Jurisdiction founded, in some cases, by the situation of the thing in question; or in order to fix the state of persons here, in respect to others abroad.

^h June 21. 1745. West-comb.

32. Execution in criminal cases, called *Imperium Merum*; and in civil, *Mixtum*, incident to jurisdiction. Execution by horning where competent, and when necessary. Arrestment by one inferior judge may be made effectual by another such judge.

By the civil law, jurisdiction in matters criminal, had annexed to it *Imperium Merum*, otherwise termed *Jus Gladii*; and, in civil cases, *Imperium Mixtum*. The first was in order to execution of sentences against criminals, the other for execution of judgments against debtors. By our form, letters of horning, and other executorial writs, proceed in the king's name of course, upon decrees of the court of session. Other judges may execute their decrees by their own precepts, for charging the party, or poinding his goods within their bounds; or, by acts of warding, to imprison the defender's person, if there found. But executorials by horning, &c. in the king's name, cannot proceed upon decrees of inferior courts, without the authority of the court of session interposed thereto, which is done by common bills that pass of course. This is absolutely necessary, in order to personal execution, when the defender removes his domicil to another territory; and to real execution upon his effects, without the jurisdiction of the judge who pronounced the sentence. For either judicial procedure, or execution of decrees without the territory of the judge, is null, by the rule, that *Extra territorium jus dicenti, impune non paretur*^a; and the party that uses such execution is guilty of a riot, spuilie, or wrongous imprisonment, according to the nature of the illegal diligence. But an arrestment, laid on by the authority of one inferior judge, may found a process of furthcoming before another, to whose territory the person in whose hands it is laid resorts; because an arrestment is only a personal prohibition to him not to deliver up the thing, or pay the sum arrested; and therefore the same must be made effectual, by a decree of furthcoming, before the judge in whose bounds he resides for the time.

^a L. ult. ff. de jurisd.

33. The import of the maxim *Par in parem non habet imperium*.

JURISDICTION cannot be exercised upon those of superior or equal jurisdiction; and hence it is said, that *Par in parem non habet imperium*^b. But a judge without his territory, being only a private person, therefore, if a sheriff is found within the territory of another inferior judge, he may be arrested and tried by him for crimes there committed, or, living in such place, may be sued in civil actions before him^c. A cause, belonging to any of the lords of session, may be judged by any other of them as ordinary; because the ordinary represents the whole lords, with liberty to pray a review before them. By this rule, no inferior judge can review the sentences of another, and it is in that sense chiefly we use the maxim: thus, the sheriff cannot examine or review the decree of a baron court, or stay execution thereon.

^b L. 14. ff. de manumiss.
l. 18. ff. de manum.
vind. l. 13.
^c pen. ff. ad scum trebel.
^c L. 11. ff. in fin. de just. et jure.

SECTION III. Courts. Judges.

34. A court, whence so called; the constituent members, the judges, parties, or their lawyers, and clerks. Courts are served by one or more judges; in-

JURISDICTION is, for the most part, exercised in Courts. *Jus*, which properly signifies law, is sometimes taken for the place where law and justice is administered^d, or for the court that administers it; and, with us, a court of justice is "the judge or judges, and other "members of court sitting in place of judicature, for administration of "justice." The court is said to be sitting when the judges are convened in the ordinary place, in order to hear and determine causes brought before them, or to do other acts relating to the execution of justice. All judges ought to keep the Hour of cause, in fencing and holding

^d L. pen. ff. de just. et jure.

^a P. 1587.
c. 87.

^b P. 1594.
c. 220.

holding their courts, which, by an old statute, is declared, as to inferior courts, to be eleven o'clock in the forenoon^a; but that, by usage, is regulated according the custom of every court. A court properly consists of the judge or judges, who are the constituent members, and pronounce the interlocutors, judgments, or decrees; the parties, or their lawiers and procurators, who plead the causes, and subject them to the consideration of the judges; and the clerks, who write the minutes and proceedings of the judges; all those, in a larger acceptation, are members of court, and expressly so termed^b. A judge "is a person vested with jurisdiction." Either one judge has the whole jurisdiction lodged in him; or it is divided among several collegiate judges, constituting one court. Thus the sheriff, steward, and inferior commissar-courts, and even the high court of admiralty, are served by one person as judge; but the court of session is a collegiate court. Nothing can be done, unless a Quorum of such court is present, which is regulated according to the constitution of the respective courts. The courts of justiciary and exchequer, and the commissar-court at Edinburgh, are collegiate courts likewise.

stances of both.

^c P. 1424.
c. 45.

It is jurisdiction alone that creates one a judge; but divers good qualities are necessary to accomplish him for the right exercise of the office. He ought to be skilful in the laws, by which he is to judge; a man of integrity, courage, and constancy, that he may do full law and justice to poor and rich, without fraud or guile, as our law speaks^c. He must determine the cause as it appears from the allegations of the parties, and as the same are proved in a competent way, *Secundum allegata et probata*. But if, in any particular case, the judge is, by his private knowledge of the fact, convinced of the injustice of the cause, tho' the justice of it is instructed by legal evidence, he ought neither to go against the laws, by rejecting a legal proof; since the justice of the nation is concerned in preserving the honour of the laws; nor determine contrary to his own knowledge; for that were to do violence to his conscience: therefore he ought to divest himself of the character of a judge as to that particular cause, and may be used as a witness, if he is regularly called^d, and an indifferent person must be appointed to officiate. A judge ought to supply what is omitted in point of law, by the parties or their advocates, but cannot matters of fact; unless they are notorious and apparent, from the documents produced in court^e. And this is expressly enjoined by our old law^f.

35. The qualification of judges, and their office; they are bound to judge secundum allegata et probata; what if the proof is contrary to what they know to be true; how far may they supply what is omitted by the plead-ers.

^d L. 6. § 1. ff. de off. præsidis, l. 1. § 1. l. 12. § 2. ff. de jud.

^e Tit. c. ut quæ deficiunt advocatis, &c.

^f Quon. attach. c. 16. § 3. stat. W. I. c. 17.

It follows, from what has been said, that there cannot be *Casus pro amico*, i. e. a case which the judge may determine either one way or other, as his affection to one or other of the parties moves him. In all cases the law has laid down rules of judging, as That, where the pursuer proves not his claim, the defender ought to be acquitted, and Where there is some proof, but not full, that either the *onus probandi*, or burthen of proving the contrary, be laid on the other party, or that an oath in supplement be admitted to the party who has brought some kind of proof, but which is defective; and Where the point of law is doubtful, the judge must determine what to him seems just, according to the principles of law, and good conscience, without hatred or favour, prejudice or partiality^g.

36. There is no casus pro amico.

^g L. 31. ff. de jur. l. 38. pr. et § 1. ff. de re judic. l. 9. ff. de reg. jur.

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37. A judge may be declined, 1. on account of capital enmity. 2. Si fo-
vet confirmilem causam. 3. If he has an interest in the cause. The fines and sentence-money not deemed such; both are now taken away.

THE grounds for declining a judge, (otherwise competent) in particular cases, are various. 1. If he have capital enmity against the party, which must be qualified and proved from facts and circumstances importing it^a. 2. If the judge have a cause of his own depending, which must be decided by the same rule with that wherein he is declined; or, as lawiers speak, *Si fo-
vet confirmilem causam*^b: for it is presumable that favour to his own cause will move him to determine the same way in the other, as he wishes may be done in his own. 3. If he has an interest in the cause, or is to be gainer or loser by the issue of it. But tho', in criminal cases, before inferior judges, a share of the fines and forfeitures went formerly to the behoof of the judges; as likewise they received sentence-money in civil cases, yet that was no sufficient cause for declining them; because they enjoyed that benefit in the right of the public; and if they malversed in the execution of their office, they were answerable for it in manner after-mentioned. But, lest a share of the fines going to the use of the judges in criminal cases, and sentence-money in civil, should influence their determination, they are justly deprived of both, by the late act, as was observed formerly^c.

^a L. 9. ff. de liber. causa. P. 1555. c. 39. ^b Cap. 18. extra de judic.

^c 20 Geo. II. B. 3. tit. last.

38. How far near relation a ground of declinature; what if the judge is equally related to both parties.

4thly, NEAR relation of the judge to any of the parties is sufficient ground for the other to decline him. Our statute provides, That no judge shall sit or vote in causes, where either of the parties is father or son, brother or sister to him, whether by consanguinity or affinity, or uncle or nephew^d. But this last extends not to relation by affinity. If the judge is equally related to both parties, the relation is no ground of suspicion against him, and yet the prohibition in the statute, being peremptory, would take place. In other countries, remoter relation than those in the statute, is sufficient to set the judge aside, or to decline him^e. But with us it is left to the judges themselves, in such case, whether they shall decline sitting or not. But where he is declinable in law, he ought, of himself, to forbear judging in the cause; unless the party, either expressly or tacitly, by comparing and not proponing a declinature, waive it. And for this reason, a decree in absence, holding a defender as confessed, given by a judge, clineable on account of relation, is void^f.

^d P. 1681. c. 13.

^e Voet. de jud. § 46.

^f Dalr. June 21. 1699. Preston.

39. The punishment of judges giving unjust sentences, or receiving bribes.

If judges give unjust sentences Wilfully and Fraudulently, (which is presumed where they are very gross) or by partial counsel, they must indemnify the parties thereby grieved, incur infamy, and are subject to an arbitrary punishment; and, if they take bribes, to confiscation of all their moveables, besides infamy and deprivation^g. Tho' the statute last referred to concerns only the lords of session, yet it may be applied to all judges, by a parity of reason. Taking of bribes or gifts, which, as the divine lawgiver dictates to judges^h, *Blinds the eyes of the wise*, is understood when judges, either by themselves, their wives, children or servants, receive money, or other valuable thing, without an adequate consideration, from parties having causes depending before them. And indeed corruption in judges cannot be sufficiently checked, being destructive to the administration of justice, and would make our lives, liberties and estates, precarious and venal.

^g P. 1469. c. 26. P. 1540. c. 104. P. 1597. c. 93. ^h Exod. xxiii. 8. Deut. xvi. 19.

BUT

BUT, as all men are liable to errors and mistakes; therefore, least the office of a judge should be ensnaring, if a judge pass wrong or erroneous sentences, thro' unskilfulness, or by mistake, he is not subject to any damage, pains or penalties; and the party can only be redressed, by getting the interlocutors, judgments or decrees varied or reviewed by the proper courts. In such case, by the civil law, the judge was liable to the party in damage, *Litem suam fecit*, and was farther censurable, as the superior judge should find just^a; but this regulation is justly everywhere abolished^b. However, a groundless and obstinate delay or refusal to do justice, is punishable, according to the prescription of our law, by subjecting the judge to the party's expences, and other arbitrary punishment, that being the same with wilful and real injustice^c. By our antient law, if a judge, by partiality or malice, delayed a cause depending before him, he forfeited his office, incurred escheat of moveables, and his life was in the king's will^d. And likewise, of old, judges behoved to remain, after they were exaundered, 40 days in the place where they had officiated, that all persons might have opportunity to enter complaints against them^e; which is conform to the prescription in the civil law^f.

40. What if a judge, thro' imprudence, give wrong judgment, or wilfully delay justice.

^a Inst. princ. de oblig. quæ quasi ex delictu, &c.
^b Groenw. de leg. abrog. ad d. tit. inst. c. P. 1469. c. 26.

^d 2 Stat. Rob. l. c. 30.
^e Quon. attach. c. 101.
^f Tit. cod. ut omnes iudices, &c.

As judges, when they do wrong, are justly censurable by the law, so their persons, characters, and dignity of their office, in case they execute it faithfully, ought to be secured, and deemed in a manner Sacred. Therefore, it is provided, That, if any person groundlessly complain of judges, as to the administration of their office, he is liable to the same punishment that the judge would have sustained, if the charge against him had been well founded, and shall incur an arbitrary punishment besides^g.

41. The penalty of groundless complaints against judges, or of invading or killing them in the exercise of their office, or injuring others while the judges sit.

^g P. 1540. c. 104.

AND for security of the judge's person, and preservation of the dignity and good order of courts, it is provided, That whoever kills, strikes or hurts any judge sitting in judgment, he is liable to the pain of death: and who strikes or kills any person, within the inner session-house, while the lords are sitting, or in the outer-house the time foresaid, he is subject to the pain of death: and whoever strikes or hurts any person, before an inferior judge sitting in judgment, he is liable to the fine of 100 l. to be employed at the discretion of the judge offended^h.

^h P. 1593. c. 177.

ⁱ 7 Annæ, c. 21.

AND, by the late British statute, it is provided, Thatⁱ if any person shall slay any of the lords of session, or justiciary, sitting in judgment, in the exercise of their office, the doing thereof shall be adjudged high treason, tho' other statutory treasons are thereby restricted to the pains of death. Such as misrepresent or accuse any of the lords of session unjustly may be punished arbitrarily, by way of action; but such as only dishonour, or lightly (that is, verbally injure) them, are to be punished by the lords themselves, who may send such to prison, till they make satisfaction, at the arbitrement of the lords^k. I have spoken a little in another place of judges malversing in their office, or giving wrong judgment thro' unskilfulness^l.

42. The punishment of killing or injuring any of the lords of session or justiciary.

^k P. 1537. c. 68.

^l B. 1. tit. 4. § 28.

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Observations on the Law of England, in relation to the Premises.

1. The case of a judge having an interest in the cause; or of his taking bribes.

IT is a rule in the law of England, That where the judge has an interest in the cause, neither he nor his deputies can determine therein, or sit in court thereon^a. If a judge of record takes bribes, and be convicted thereof, he shall lose his office, and be fined and imprisoned^b.

^a Vin. (judges) p. 573.

^b Vin. ibid. 577. 580.

2. Judges must do right, notwithstanding any command from the king: if they deny right, are answerable to the king, in body, lands and goods.

DIVERS statutes in England^c ordain, That all judges and justices, tho' command shall be made by the king's seal to disturb or delay common right, shall proceed to do right notwithstanding; and, if they deny a party his right, or be found in default, they shall be answerable to the king, in body, lands and goods. They ought not to express their opinions before-hand, but only give it in causes before them in due course; nor give judgment against law, tho' both parties should agree in desiring it^d.

^c 2 Edw. III. c. 2. 18 Edw. III. c. 4. 20 Edw. III. c. 23.

^d Ibid. 80. 579.

3. The penalties of committing offences in the courts of Westminster-hall, while the judges are sitting.

If one draw a weapon upon any of the judges of the courts of Westminster, sitting, tho' he does not strike, he shall lose his right-hand, and be imprisoned for life, and his lands shall be seized by the king, during such offender's life. And if, in court, one shall strike a juror or other person, with his hand or weapon, he shall undergo the same punishment; but an assault, without striking, is not punishable in that manner^e. And the like holds in the case of the justices of assize, or Oyer and Terminer^f.

^e Vin. (striking) p. 17.
^f Ibid.

4. All offices of justice were of old for life. The judges in Westminster-hall hold their offices for life; the case of reflections upon them.

It is said, That in England, at common law, all officers of justice had estates for life in their respective offices; and, in this respect, the wisdom and policy of the law was very great, for it was an encouragement to the faithful execution of their duty. However, the judges of the several courts at Westminster held afterwards their places *Durante beneplacito*; but thereafter by statute, and at present they hold the same, *Quamdiu se bene gesserint*, viz. for their life, and good behaviour^g. They must hold their courts in their proper person, and cannot act by deputies^h. For protection of those judges against abuses, all scandalous reflections upon them are holden to fall within the statutes of *Scandalum magnatum*ⁱ.

^g Bac. new abr. (offices) 733. 12 Will. III. hBac. ibid. 739. i Vaug. 138.

5. What if an officer acts contrary to the nature and duty of his office; how must he be divested.

If an officer acts contrary to the nature and duty of his office, or if he refuse to act at all, the office is forfeited: but where one, that holds his office by patent, commits a forfeiture, he cannot regularly be turned out without a judgment, on a *Scire facias*, nor can he be said to be completely divested without a writ of discharge; for his right appearing of record, the same must be defeated by matter of as high a nature^k.

^k Bac. ibid. 741.

6. Offices of inheritance imply a power of acting by a deputy, but judicial offices do not. The principal answer-

SOME offices, in their nature, imply a power or right of executing them by deputies, as offices of inheritance, or such as require only a superintendency: but otherwise, a judicial officer cannot make a deputy, unless there is a clause in his patent to enable him; because his own judgment is relied on. Where a deputy may be lawfully appointed, the rule is, *Respondeat superior*, and therefore all officers regularly

^aBac. 738,
&c.

regularly shall answer for their deputies, in the same manner, as if the acts were done by themselves, except in crimes ^a.

able for the
actings of his
deputy.

^b25 Edw. III.
Bac. ib. 744.

As all wilful breaches of the duty of an office infer forfeiture of it, so there can be no doubt, but officers of justice are punishable at common law, for corruption and oppressive proceedings, according to the nature and heinousness of the offence. And it is said, Bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was punished as high treason, before the statute limiting the cases of treason to those mentioned in the act ^b.

7. Judges
are punish-
able for wil-
ful breaches
of their duty
at common
law; and
bribery in
them was ad-
judged trea-
son of old.

^cBac. new
abr. (courts)
548.

THE most general division of courts in England, is into such as are of Record or not; those of record are again divided into such as are Supreme, Superior or Inferior. The supreme court, is the high court of parliament, and particularly the house of peers, over all Britain ^c. Superior courts of record, are again those that are more principal, or those less principal. The more principal, are the courts in Westminster-hall; the less principal, are either by custom, as those holden by commission of goal-delivery, Oyer and Terminer, &c. or by charter, as the courts of the counties Palatine; or by virtue of acts of parliament and the king's commission ^d. Inferior courts of record, ordinarily so called, are corporation-courts, courts leet and the sheriff's Tourn, &c. ^e.

8. Courts
are either of
record or
not: the first
are either su-
preme, viz.
the house of
lords; supe-
rior, as the
courts in
Westminster-
hall, &c. or
inferior, as
courts leet
and the she-
riff's tourn.

^dBac. ibid.

^eIbid.

COURTS not of record, are the courts-baron, county-courts, hundred-courts, &c. Also the admiralty and ecclesiastical courts are not courts of record, but derive their authority however from the crown. A court that is not of record, cannot regularly impose any fine upon an offender, nor award a *Capias* against him ^f.

9. Courts not
of record;
they cannot
impose a
fine, or award
a *Capias*.

^fBac. ibid.
559.

EVERY court of record has, incident to it, not only power to impose reasonable fines on offenders, formally convicted, but also on such as shall be guilty of any contempt in the face of the court. They have power of protecting, not only the parties themselves, but likewise all witnesses, *Eundo et redeundo*, viz. in coming to court, and returning from it, upon emitting their depositions, in a suit there depending; for it would be unreasonable, that one should be molested, when he is giving obedience to the process of the court, which obliges him to appear ^g.

10. Every
court of re-
cord may
impose a fine
upon offen-
ders. They
have power
to protect
parties and
witnesses.

^gBac. ibid.
565.

TOWARDS the latter end of the Norman period, the court of the high justiciar of England was divided into four distinct courts, viz. the Court of Chancery, King's Bench, Common Pleas and Exchequer, as they are at this day in Westminster-hall. As the court of the high justiciar had a supreme jurisdiction in criminal matters, as well as civil, the court of king's bench retained the greatest similitude with that antient great court. It hath always had a superior original jurisdiction in all criminal matters, and in some particular civil cases; but it cannot determine in a mere real action ^h.

11. The
court of the
high justiciar
divided into
the four
courts of
Westminster-
hall. The
court of
king's bench;
its jurisdic-
tion.

^hHawk. P.C.
b. 2. c. 3. § 6.
Bac. ibid.
591.

THE court of common pleas was established for the determination of pleas merely civil, and was at first ambulatory, and removed with the

12. The
court of com-
mon pleas

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has jurisdiction in pleas merely civil; it is the lock and key of the common law.

the king wherever he went; but thereafter it was ordained to be holden in a certain fixed place, by the great charter, *Communia placita non sequantur* (says the king) *curiam nostram, sed teneantur in aliquo certo loco*^a. This court is the lock and key of the common law in common pleas; for herein are real actions, whereupon fines and recoveries do pass, as also, all other real actions by original writs; and that besides common pleas, mixed and personal, in divers of which the king's bench hath a concurrent jurisdiction with this court^b.

^a Cap. 11.

^b Bac. ibid. 596.

As to the court of exchequer in England, that court with us is modelled after the same; and I shall discourse of it hereafter; and shall likewise take notice of the high court of chancery.

13. All courts of record are secured from prosecutions, on account of any error in their judgment, as to any thing done by them openly as judges.

THE law of England secures judges of all courts of record from prosecutions whatsoever, on account of any error in their judgment, as to any thing done by them openly, in all causes, as judges: for the authority of a government cannot be maintained, unless the greatest credit be given to those who are so highly intrusted with the administration of public justice^c.

^c Hawk. b. 1. c. 72. § 6.

T I T. III.

Advocates. Proctors.

1. Advocates and proctors, necessary members of court.

THE great design of jurisdiction and judges is, that justice may be administered to parties, in relation to the differences between them; and therefore, to constitute a judicial litigation, called an Action, there is necessary a judge; and the parties, *viz.* a pursuer and defender, who are for most part represented by their Advocates or Proctors; wherefore those come next to be considered. They are most necessary members of court, in order to the due administration of justice, that persons, who make it their business and profession to practise in the law, may state cases, and lay causes before the judges, in a proper light, for a decision. I shall first speak of lawyers and advocates; and next touch upon proctors that appear before inferior courts, and are advocates of a lower rank.

2. A lawyer; applicable to judges, clerks and professors of the law; but ordinarily understood of advocates.

A LAWYER, is "one that professes knowledge of the law;" and so the character belongs not only to advocates, but likewise extends to judges, clerks and professors, or teachers of the law; but it is ordinarily understood with us of Advocates, who plead and practise in the law, by public authority, before the lords of session, and other superior courts of justice.

3. How far people may, or ought to plead their own causes.

ALL parties were of old allowed, with the Romans, to plead their own causes; and even women were not debarred in such case^a: and, with us, people may employ lawyers in their causes, or not, as they please^b; but, for most part, it is not advisable for persons to plead their own causes. Ignorance, and want of experience in law-affairs, would lead many into errors and mistakes, to their own prejudice: and even the ablest lawyers do not generally trust themselves in pleading their own causes, but commit them to others of their fraternity. Anxiety is apt to influence persons too much, on such occasions, in their

^a L. 1. § 2. 3. ff. de postul.

^b P. 1537. c. 51.

their own concerns; whereas, a disinterested advocate represents his clients without their passions.

ADVOCATES, in the times of the old commonwealth of Rome, were such as took others under their protection, who were called their Clients, and they their Patrons; those generally, by the pregnancy of their parts, or advantage of their high birth, expected to be raised to the eminent posts in the government, by the assistance chiefly of their clients. Hence, ambition was their motive, and glory, and preferment their reward. They did not receive in those days any honoraries or fees; yea, when such practice was beginning to obtain, the Cincian law was made, expressly prohibiting it, *Ne quis* (says the law) *ob causam orandam donum munusve accipiat*^a. But thereafter, under the emperors, when preferments came not by the interest of the people, advocates were allowed to be rewarded for their service^b; and, since Those who serve at the altar are intitled to live by the altar^c, there is no reason, why those who serve at the bar should not live by the bar. At the same time, tho' action be competent for such gratification, advocates, who regard their character, abhor such judicial claims, and keep in their mind the notable saying of Ulpian, upon the like occasion, *Quædam etsi honeste accipiantur, inhoneste tamen petuntur*^d. Pursuant to the above original, advocates are still called *Patroni causarum*; because they support and maintain their clients in the causes which they undertake for them.

4. How far advocates intitled to honoraries.

By the custom of the Romans in the imperial state, persons, without being licensed by public authority, might act the part of advocates in pleading for others; but, at the same time, people of certain characters were excluded. Women were antiently allowed: but, on occasion of the petulancy of one Affrania, in her pleading, the whole sex was laid under a disability; and indeed such function did not well suit the modesty of the sex. Persons infamous were likewise debarred, lest the honour of the court should be stained. Again, minors under the age of 17 were disabled to exercise the office, but above that age they might, which was occasioned by Nerva a great lawier, his being said to have practised in the law at that age^e. Persons who were discovered to have made *Pactum de quota litis*, a compact for a proportion of the subject in suit, were justly disabled to continue in the office. And, when the empire became Christian, all who were not of the Christian faith, as established in the empire, were excluded from the bar^f. By the later constitutions of the emperors, advocates were admitted to the office by the judges of the respective courts, before whom they were to practise, and none other had the privilege^g.

5. The custom of old, and by later constitutions among the Romans, as to the admission of advocates; who excluded from the office.

It does not appear, that of old we had any advocates licensed by public authority; but, on the institution of the college of justice, a certain number of advocates were to be admitted by the lords of session, to procure or plead in all causes. They were called General Procurators, and were to be men of best fame, knowledge and experience^h. And the law still continues the same, with certain preliminaries, in order to their admission, that none but persons well qualified for that important office may be received into it. And, in order there-

6. The case of old, as to advocates with us; the manner of admitting them at present.

^a Liv. lib. 34. Plin. lib. 1. epist. ult.

^b L. 1. § 10. ff. de extraord. cognit. ^c 1 Cor. ix. 13. 14.

^d D. 1. 1. § 5. de ext. cognit.

^e L. 1. § 3. 5. l. 8. 9. ff. de postul.

^f L. 5. l. ult. c. de postul.

^g Tit. cod. de advocatis diversorum judiciorum et judicum.

^h P. 1537. c. 64.

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to, they are admitted by the court of session, after undergoing a trial upon the whole body of the civil law; and, by the late regulation, upon the Scots law likewise^a, before certain advocates, yearly appointed examiners of intrants or candidates for the law, by the faculty of advocates. And thereafter they are subjected to a public trial, by defending Theses upon a certain title in the civil law, assigned them by the Dean of faculty; and before their admission make a speech to the lords upon some law in that title, and take the oath *de fidei*, viz. for the faithful performance of the office, and oaths to the government.

^a Act of sed.
1750.

7. Advocates may plead before all courts.

Tho' advocates are admitted only by the lords of session, yet they have a privilege to plead and practise before all courts in Scotland, and likewise before the house of peers. There is no distinction among them, but such as their merit and reputation makes, with an exception as to the king's advocate, as after-mentioned. They make no scruple to appear, upon occasions, before the high court of admiralty, and commissars of Edinburgh, those being, in some sense, superior courts; but think it derogatory to plead before inferior courts, except in important cases, or upon extraordinary occasions.

8. The faculty of advocates, their ordinary and extraordinary meetings: the dean presides in them.

THE faculty of advocates is The whole society of them, considered as a corporation. They have a Dean annually elected, that presides in their meetings; and Treasurer and other officers of their own number. There is a common stock belonging to the faculty, employed for the benefit of their library, and towards the support of their decayed members, their widows or children, who want subsistence. An ordinary meeting of this body must consist of 25 members; but in the anniversary meeting, where they elect the dean and other officers, or in disposal of any of their stock, there must at least be 45 present. As the dean presides, he signs the acts of the faculty.

9. The qualifications and duty of an advocate.

NOT only good natural endowments, a liberal education, and a knowledge of the law of this country, and of the stile and forms of securities, are necessary to accomplish an advocate; but likewise a competent theory of the civil law, which is in effect a transcript of the law of nature and nations, is requisite to complete his character; especially, since our law is, in a great measure, founded on the civil law. And, for that reason, the wisdom of our law subjected candidates for the law to a trial on that law, in order to their admission. An advocate ought to be capable to consult and advise his clients cases, to plead their causes, and draw their informations, or other writings necessary, to put them in a clear light before the judges. This he ought to do, rather with the strength of argument, than colouring of eloquence, since he addresses himself to a bench of learned judges, who can only be convinced by the prescript of the law and force of solid reasoning; and not to a popular assembly, which is influenced by working upon their imaginations and passions; as was the case of the celebrated orators in antient Athens and Old Rome, in the times of those flourishing commonwealths. At the same time, he may use art to elude the artifice and cavils of his adversary, *Nec videbitur dolo fecisse qui fraudem exclusit*, according to the dictate of the eminent Papinian^b. But he must by all means abstain from advancing

^b L. 77. § 31.
ff. de leg. 2.

vancing untruths, calumnies, or reflections. However, he is bound to lay open facts that influence the cause, tho' tending to the prejudice of the character of the other party or third persons; but this ought to be done with all candour and ingenuity, and with as little air of reproach as possible. Excesses in that respect are not only derogatory to one's character, but likewise censurable as an indignity to the court, and often prejudicial to the cause in support of which they are advanced.

THE office of an advocate was always esteemed most honourable among the Romans^a, and is at this day most worthy, and much esteemed among all civilized nations, and particularly our own. The eldest sons of peers have practised as advocates, without disparagement to their character. The benches of the superior courts are supplied from the advocates, but they must have served five years before they can be presented by the king in order to their admission: and by the late regulations, all sheriffships must be provided with sheriff-deputes that are advocates of three years standing at least^b, as shall be fully set forth when I treat of sheriff-courts^c.

By the civil law, and our antient statute, advocates gave their oath of calumny, before pleading, in every cause^d; but, by our present custom, the oath which the advocates make at their admission, for the faithful administration of the office, is generally understood to be a sufficient check upon them not to undertake causes which they think calumnious or unjust. Therefore the oath of calumny is only given at the desire of the other party, and may be demanded upon allegations made in any state of the process. It imports, That the party, against whom they are offered to be proved, knows they are true, and that therefore it is needless to put the other to the expence and delay of a proof; or That the proposer, who insists upon them, knows they are not true; so that it is dilatorious and calumnious in him to propound and insist upon them. A party is not bound to give his oath of calumny on his own recent fact, since, upon the matter, the same resolves in an oath of verity^e. It may be exacted, either from the advocate or the party. By the foresaid old statute, an advocate, in giving an oath of calumny, is said to swear In the soul of his client, *i. e.* as I take it, That he believes his cause is just, and that the client does not calumniously insist in affirming or denying the matter of fact in issue. It cannot be required of a pursuer of a reduction and impro- bation, before the production is satisfied^f, the design of such action, till then, being to force the production; but when the reasons of reduction are insisted in, this oath may regularly be put to the pursuer, Whether he has just ground to make the allegation; or to the defender, Whether he has reason to deny the same.

AN advocate applied to for advice ought to fit, in a manner, as judge upon the cause, and give his opinion with all imaginable impartiality: and where it happens to be against the client, who, notwithstanding, insists to have the matter tried, the advocate may undertake the cause with a good conscience; for he may be mistaken, as none of us can pretend to infallibility, and the judges may differ in opinion from him: and how oft do we see advocates of the greatest abilities dif-

10. The office of an advocate honourable; the benches of the superior courts supplied from them, and sheriffships likewise; a new regulation upon that account.

11. The oath of calumny, when given of old, and by the present usage.

12. The advocate's duty, on his being consulted, and in conducting himself thereafter. The oath of calumny con-

^a L. 14. c. de advocatis diver. judic.

^b P. 1707. c. 7. 20 Geo. II. c. Inf. tit. 14.

^d L. 14. § 1. c. de judic. P. 1429. c. 125.

^e Act of sed. Jan. 13. 1692.

^f Dalr. Nov. 22. 1716. Hume.

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cerns matters
of fact only.
He ought not
to delay
causes.

disappointed in the event of causes? Tho' an advocate ought to plead his client's causes to the utmost of his power, in point of law, yet he ought not to mislead the judges in point of fact; for, in such case, he is guilty of the injustice done by the judges, who are thereby inveigled against the right of the cause. And this leads me to observe, That the oath of calumny properly concerns matters of fact only; for, as to points of law, whatever opinion an advocate may have of the same, he must ingenuously plead what occurs to him in support of his client's cause, leaving to the judges the import of his pleading; since no advocate is so self-sufficient as absolutely to rely on his own sentiments, in doubtful matters of law; and the judges frequently differ from the judgment of the most eminent lawiers. It is implied in the nature of the office, and indeed in the oath given by the advocates at their entry, That they shall not prolong a suit if it is in their power to shorten it to the advantage of the client; nor indeed Calumniously to delay the other party.

13. An advocate bound to desert a cause, when he finds it calumnious, or when a supervening relation to the contrary party obliges him to it, but cannot engage on the other side.

IF, during the dependence of a cause, an advocate discovers That it is unjust or calumnious, he ought to desert it, in consequence of his oath at his admission, and in point of conscience and justice to his character; but then he can by no means engage with the other party, since he has got the secrets of the client, whom he is bound to forsake, communicated to him. But if, by supervening relation, one is obliged, by the duty of his office, to support the contrary side, he may, by the rules of the civil law. For instance, one that had served as advocate against the father, happens, pending the suit, to become tutor or curator to the son, he may serve his pupil in the same cause against his former client^a. But it would seem more honourable and decent that, in such case, the pupil's cause should be committed to an indifferent advocate, and that the tutor or curator withdraw from serving on the other side, and not concern himself in the cause.

^a L. ult. ff. de postul.

14. Advocates ought not to be addicted to gain; are intitled to their fees. In what case ought they to be returned, when the service is not performed.

ADVOCATES ought not to follow sordid gain; but, both by the civil law and ours, fees, or honoraries, are due to them for their service. As these were taxed by the civil law^b, so they were by our regulations 1672; but now parties are at liberty to reward advocates as they can afford it, and as the cause requires. Sometimes it happens that, after a lawier is consulted, he has not occasion to compare for the client, the cause perhaps being compounded; but tho' the service is not performed, he is not bound to return the honorary, unless that happened thro' his fault^c. An advocate's heirs, by the civil law, are not liable to restore the fee, tho' he dies before serving in the cause, since the failure happened thro' accident^d. But, in such case, if the advocate was fee'd, in order to draw an information, or other writing in relation thereto, and dies before it is performed, the fee is what the law terms *Causa data et non secuta*; the onerous consideration for which it is given is not performed, and therefore it would seem that the same ought to be restored.

^b L. 1. § 11. and 12. ff. de extract. cognit.

^c L. 38. § 1. ff. locat.

^d L. 1. § 13. ff. de extraord. cognit.

15. The case of advocates enjoined by the court to

THERE are some causes, both civil and criminal, so odious, or some persons of such abject character, that an advocate may think it a dishonour to appear in such causes, or for such clients, unless he is enjoined

joined by the court. But a recommendation of that kind does not hinder the lawier from being intitled to his honorary, when the party is in condition to give it; the design, in such case, not being, that the advocate shall serve *gratis*, but only that his reputation should not suffer by employing his service in such a cause.

plead for a party.

WHEN the party is found liable in expences of suit to the other, an advocate may state his fees against such party, even in his own cause; or where he serves a client having the benefit of a *gratis* warrant; or otherwise without receiving fees, there being no reason, that the other party who is found to be calumnious, or a litigious party, should have advantage from these circumstances; and, in the case of advocates for the poor, it is particularly so provided by an old act^a. At the same time, an advocate ought not to be mercenary, nor take more or higher fees than the cause requires, or is suitable to the condition of the parties.

16. May advocates state fees in their own cause; or when they serve the poor, if the other party is found liable in expences.

^aP. 1444.
c. 45.

AMONG the Romans, the judges might compel advocates to plead for parties whom they inclined to refuse, and were bound to take care, that all the most eminent lawiers should not be on one side of the cause, but proportion them equally^b. We have no such regulation. Parties may choose what lawiers they please, that are willing to accept their business: but advocates may be compelled, by our law, to plead for parties, or undertake their cause, whether in civil or criminal matters, unless they have a reasonable excuse^c. And all persons under prosecution for crimes are intitled to have advocates to defend them; and if they can get none, by their own interest, the court must appoint advocates for them, tho' standing indicted of the most atrocious crimes; and the reason assigned in the statute is, That the suit of the accuser may not be taken *pro confesso*^d.

17. The court must appoint advocates for parties who can get none to undertake for them. How far advocates compellable to serve.

^bL. 1. § 4. ff. de postulando l. 7. c. de advoc. divers. judic.
^cP. 1537.
c. 64.
P. 1587. c. 91.

^dD. act 91.

ADVOCATES are yearly named by the faculty, at their anniversary meeting, to serve the poor, that are admitted to the benefit of a *gratis* warrant by the lords of session. This is obtained on a petition from the party, and a previous inquiry into his circumstances, certified by the church-session or justices of peace; and probability of the cause reported to the lords by an advocate and writer for the poor, to whom the petition is remitted to consider the same, and give their judgment thereon.

18. Advocates for the poor. How is one admitted to the poor's roll.

^e11 H. VII.
c. 12. 25 H.
VIII. c. 15.

IT is provided by statutes in England^e, That the court shall grant the privilege to plaintiffs to sue *in forma pauperis*, which is obtained upon a petition presented by the party, with a council's hand to it, certifying the judge, that he conceives the petitioner has good cause of action: and the party must make oath, that he is not worth 5 *l.* besides the subject in question. If he does not go on in his suit, but vexes his adversary, the court will dispauper him; if he is non-suited, the court will tax the costs, and he has his election, either to pay them, or be whipt; till either of which be done, he is not allowed to proceed in another action for the same cause. If he prevails, he is intitled to costs, but only to pauper-costs, such as he swears he has paid, or is to pay. But no previous agreement with counsellors or attorney, touching their fees, is allowed; and, if he give any fee or

19. Plaintiffs procure the benefit of suing in forma pauperis, by statute in England. If they make any agreement with counsellors or attorneys, touching their fees, they are dispaupered.

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reward to them, or make any contract touching the same, he shall be dispaupered. And if it shall appear, that he hath sold or contracted for the benefit of the suit, or any part thereof, while it depends, such cause shall from thenceforth be totally dismissed the court ^a.

^a Vin. (pauper.) p. 259. &c.

20. One cannot sue in forma pauperis for slanderous words.

IN an action for slanderous words, none is admitted to sue *in forma pauperis*, in discouragement of such suits, which frequently proceed from mere humour ^b.

^b Bac. new abr. (pauper.) 823.

21. How far defendants intitled to plead in forma pauperis.

THE statutes above referred to make no mention of defendants being intitled to plead *in forma pauperis*, and 'tis in the discretion of the court to admit them to such benefit or not ^c.

^c Bac. *ibid*.

22. May an advocate make a paction with a client to serve him gratis in the mean time, but that, in the event of the cause won, the advocate shall have the ordinary fees.

THO' gratitude should oblige poor people, after gaining their causes, to reward suitably the lawiers, and others who employed their industry and pains therein; yet it is not honourable for an advocate to make a paction with the client, in the mean time to serve *gratis*, but that his fees shall be paid in the event of winning the cause; for that would imply a mercenary disposition, and too much fondness in seeking after business, which, tho' advocates ought to embrace when offered, yet to court it is unworthy a man of character. And therefore, when an advocate employs his service in a cause, for such as are not able to undergo the ordinary expence, he ought to leave it to their pure generosity, when, by gaining the cause, they arrive at better circumstances, to reward him suitably, as the principles of gratitude shall move them; for a paction with a client about fees, at any rate, is mean and mercenary, *Honeste accipiuntur, sed inhoneste petuntur*, as the lawier speaks on the like occasion ^d. But, as above, in such case, if the adverse party is found liable in costs, the advocate for the poor client may justly, and without impeachment of his honour, take what is allowed on that account.

^d L. 1. § 5. ff. de extra. cognition.

23. A paction de quota litis not lawful. May an advocate be deprived that offends in that respect. The buying of pleas by members of court discharged, and infers deprivation of the offender.

MUCH less ought a lawier to agree with the client For a proportion of what shall be recovered, in place of his fees. This paction is termed *Pactum de quota litis*, and was reprobated, and punishable by forfeiture of office, conform to the civil law, as above ^e. Our law annuls such execrable compact, and the court may deprive the offender for such misbehaviour, according to the foresaid prescription of the civil law; it being presumed, that if such bargains were allowed, suits would be carried on with too much heat and eagerness ^f. This is likewise extended to writers; but, if the suit was ended before the paction, it will be sustained ^g; because then the party was at full freedom, and the reason of the law ceases. Upon the same ground, advocates, and all members of the college of justice, or of other courts, are prohibited to buy things in suit, upon pain of deprivation ^h. I had occasion formerly to take notice of these practices ⁱ.

^e L. 5. c. de postul.

^f L. 1. § 12. ff. de ext. cognit. l. 35. ff. de pactis. ^g Feb. 24. 1675. Hume. June 23. 1680. Ruthven. ^h P. 1594. c. 220.

ⁱ B. 1. tit. 11. § 11. tit. 18. § 7.

24. The punishment of lawiers malversing in their office. What if errors escape them without delinqu.

As lawiers are worthy of great praise and commendation, when they execute that honourable office faithfully, so, if they betray their client's cause, or fraudulently do, or omit any thing whereby it is lost or prejudiced, they are not only liable to the client's damage, and incur disgrace and infamy by such treacherous misbehaviour, but are further punishable, according to the degree of offence ^k. But if,

^k L. 1. § 1. l. 3. § 2. ff. de pravaric.

if, thro' his mistake, the client is damnified, he has no remedy against the advocate, who did his best, and cannot be answerable for the consequences of his advice, which was not fraudulent^a. The errors or mistakes of advocates among the Romans behoved to be rectified in three days^b; but, with us, it may be done any time before the decree is extracted, but not thereafter. This concerns only mistakes in point of fact; for, as to matters of law, the forms exclude a rectification after a limited time, even before extract.

^a L. 47. ff. de reg. jur.

^b L. fin. c. de error. advocat.

BUT parties may likewise suffer prejudice in their causes, by the fault of the agent or procurator, who manages the fact of the cause, as the lawier does the law of it. Agents are liable to reimburse the client all damages incurred thro' their fault, or of those whom they employ^c. The authority or commission of an agent will be presumed, from his having his client's writings relative to the cause; but, if they act for persons abroad, they must have a written mandate or commission. And that speedy and easy justice may be done to parties that conceive themselves aggrieved by the management of their advocates, or others that conduct their law-suits, they are answerable, on a summary complaint, before the lords of session, in all matters that concern the exercise of their respective offices before them. But, in other extraneous claims against them, they can only be sued in the ordinary course of proceedings; which, in civil cases, can only be before the lords of session, by the privilege common to all the members of the college of justice.

^c Nov. 28. 1710. Fullarton.

25. The penalty of agents or procurators malversing; their mandate how presumed. Advocates and agents must answer upon summary complaints, in such cases.

ADVOCATES have, by the privilege of their gown, a presumed warrant to appear for persons within the kingdom without a written mandate; but not for those that are abroad in foreign parts, or even in England; for in matters of judicial procedure with us it is still accounted such. And if, upon compearance for one within the kingdom, a decree *in foro* is extracted, he is concluded, and cannot thereafter disclaim such appearance made for him; because the other party has interest therein, and cannot be deprived of it by the oath of his adversary, or advocate insert as compearing for him, That he had no warrant^d.

^d Decem. 7. 1676. Bannatine. Dec. 11. 1678. Grant.

ADVOCATES are bound by their office not to reveal the secrets of their clients causes, nor indeed can they, as witnesses, be bound to depose touching the same. But in an exhibition, or proving the tenor of writings, the advocate will be obliged to depose, tho' against his client, Upon his having seen the writing, and what the tenor of it was; but not Concerning the existence or tenor of it, from what had been communicated to him by his client, otherwise than by the sight of the writing itself^e. An advocate may likewise be compelled to depose upon facts relating to the cause, consistent with his knowledge, otherwise than by his client's information, for that is not to discover the secrets of his client committed to him; and, if that were not allowed, the other party might be deprived of a necessary witness, by the adversary's choosing him for his advocate. The same is the case of an agent in this respect.

^e Decem. 21. 1675. creditors of Wamfrey.

26. How far an advocate's presumed mandate supports the proceedings.

27. Are advocates bound to depose against their clients.

THUS

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28. May a counsellor, solicitor or attorney, be examined against his client by the law of England.

THUS likewise, by the law of England, a counsellor, solicitor or attorney, ought not to be examined upon any interrogatory, touching the titles, or other particulars, which they know only by information from the client; but, as to other matters, or even such as they had discovery of from the party, before they were retained by him, they may be examined^a.

^a Vin. (advocates) p. 482.

29. The king's advocate; his business to advert to the king's concerns in law-suits; can he, without a special warrant, insist for the king, to reduce any private man's rights. How far the negligence of the king's officers can prejudice him: the office of the solicitor.

I HAVE already observed, that the king's advocate is superior in dignity to other advocates. He has his commission from the king, during pleasure, and takes care of his majesty's interest before the courts of session, justiciary and exchequer. All actions, civil or criminal, that concern the king's interest, must be carried on With concurrence of the lord advocate, for his majesty's interest; and indictments for crimes must be in his name, as accuser. But the king's advocate cannot insist upon the king's interest, for one party against another, both deriving right from the king, without a special warrant in writing^b. The negligence of the lord advocate, or other of the king's officers, in pursuing or defending his causes, cannot prejudice his majesty's interest^c. The solicitor takes care likewise of the king's interest, as assistant to the advocate. Both have the privilege of pleading within the bar; at least the solicitor formerly enjoyed it, tho' now the two gentlemen, joined in the commission as solicitors, do not use such privilege.

^b Jan. 20. 1680. Earl Southesk.
^c P. 1600.
C. 14.

30. Procurators-fiscal before inferior courts supply the place of king's advocate; the power of other procurators, as to deferring or referring points to oath.

INFERIOR courts have a procurator-fiscal, who supplies the place of the king's advocate before them, in prosecutions of crimes. Procurators before inferior courts are a kind of advocates of a lower rank, for they plead for others, as advocates do. They have only privilege to practise before the particular courts who admit them. Their warrant is not presumed, as in the case of advocates; but they must produce a written mandate from the employers, or their writings concerning the cause, or make circumstantial allegations which may presume a mandate^d. They cannot refer or defer a point to the contrary party's oath, without a special mandate^e; because that is a kind of transaction concerning the client's right, which must depend on the issue of such oath. And I conceive, it is not in the power even of an advocate, to make such reference, without a warrant from the client, which, tho' presumed, may be taken off by his oath, while the cause is in dependence.

^d Decem. 12. 1676. Holm.
^e Jan. 4. 1709. Hardy. Jan. 18. 1712. Inglis.

31. Advocates in process called procurators, but more properly termed Prolocutors.

ADVOCATES are called Procurators, in all acts and decrees where they are mentioned compearing for parties. I conceive, this has its rise, from their being called General Procurators of the court, in the article touching them in the institution of the college of justice; but 'tis thought they are more properly named Prolocutors in another statute^f. Which character likewise agrees to Proctors before inferior courts, who, in some places, particularly in Aberdeen, assume the title of Advocates.

^f P. 1537.
C. 64.
P. 1587. c. 38.

32. Advocates and proctors removable summarily.

ADVOCATES may be suspended or removed by the lords of session, upon just causes of malversation, summarily; but otherwise, they cannot at pleasure be deprived of their office, or suspended as to the exercise of it^g. This ought likewise to be the rule as to proctors before

^g Had. Nov. 28. 1609.

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before inferior courts, with respect to their being suspended or deprived by the judges who admit them; and, if they are wronged in that respect, they may apply to the court of session for redress, by a summary complaint.

T I T. IV.

Clerks of Courts, and Clerks to the Signet. The Registers.

SECTION I. *Clerks of Courts, and to the Signet.*

CLERKS who write the interlocutors and judgments, or decrees of courts, come next to be considered. Their business is fairly to take down the proceedings of the court in their minutes, as to which the same are probative, *Nam in actis officii et processus credendum est clerico*, faith must be given to the clerk, as to the proceedings of the court. But, in respect to extraneous things, as the party's consent, or the like, the extract of a decree before an inferior court, bearing That it was so done, will not be credited, unless it is set forth, that he signed his consent, or that the judge subscribed for him, if he could not write: however, as to one's restricting his libel, the clerk's affirmation of the same, even in the proceedings before an inferior court, is good^a.

1. Clerks their business; how far their minutes to be credited.

^aFount. Dec. 1. 1693. Brown.

THE minutes and interlocutors of a court are termed the Record of the Court, or the Rollment of Court; because of old they were not wrote in books, but inrolled together in paper^b. Hence the lord clerk-register, whose deputies the clerks were, was termed *Clericus Rotulorum*. Clerk, in our old law, properly denotes a clergyman^c. And, I conceive, it has been transferred to persons that officiate in minuting the proceedings of courts, because clergymen were mostly employed in that business, as it was difficult, in antient times of ignorance, to find others capable to exercise the office. This, I am induced to think, because we see, that, even after the reformation, churchmen officiated as court-clerks, till they were prohibited by express statute^d; and it appears from the same statute, that they were in use to act as notaries, who were generally employed in the office of clerkship.

2. The minutes of clerks; the record of the courts. Churchmen of old officiated in that business; and hence they are called clerks.

^bSkeen (record. curia)
^cP. 1424. c. 13.

^dP. 1584. c. 133.

If clerks malverse in their office, by not fairly entering the proceedings of the court, or otherwise, they are not only liable to the party leased in damage^e, but likewise are censurable by the judge or judges of the court, according to their demerit; since the members of a court must be subject to its jurisdiction. But which, as to inferior courts, it would seem, cannot exceed suspension for a limited time. For, as to deprivation, the same cannot be inflicted, otherwise than by a superior court, as the courts of session, justiciary or exchequer. But in other courts, as the sheriff or steward-court, the judges, in my opinion, have no such power; for that their clerks having commissions from the crown, can only be removed by a proper action, before the court of session, for that purpose.

3. How clerks censurable, or deprivable from their office.

^eDecem. 30. 1709. Johnston.

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4. In what
sense writers
to the signet
deemed
clerks to the
session.

ALL the Clerks to the signet, now likewise termed Writers to the Signet, are in some sense clerks to the court of session; and, in the original constitution of the college of justice, there was only one clerk of the session who was chosen by turns from amongst the clerks to the signet, as Sir George Mackenzie informs us^a. At present, they write and sign all bills, whether common, that pass of course before the ordinary on the bills, as bills for such summonses as require them, and bills of horning, &c. or others which pass only *causa cognita*, upon summary examination of the case, as for suspensions or advocations, &c. Upon all those bills, when past, letters or writs in the king's name are thereafter expedited under the signet, and the writers to the signet sign them likewise; and hence proceeds their designation. But other bills or petitions to the lords of session, in presence, were originally offered to them, and their deliverances thereon written by their own clerk^b.

^a P. 1537.
c. 59. et ibid.
Mackenzie.

^b Ibid. c. 61.

5. The clerks
of session at
present.

AT present there are six principal clerks of session, who serve the court of session in the inner-house. They are named by the king, examined and admitted by the lords of session, and must have served three years as advocates, or writers to the signet, before they can be admitted. Their office implies that of notaries, tho' they were not such before their admission. There are likewise six under-clerks who serve the ordinaries in the outer-house. Three offices or chambers belong to the ordinary clerks of session, and two clerks, with their under-clerks, are conjoined in each office. There is a register kept in every one of these offices, for registering all writings recorded in the books of session by the clerks, as deputies to the lord clerk-register, who formerly had the nomination of them^c.

^c P. 1685.
c. 38.

6. Clerks to
the bills.

BESIDES those, there are two clerks to the bills, and an under-clerk, who present to the ordinary on the bills all the fore said bills, written and signed by the writers to the signet.

7. Extractors,
their office.

As it is the province of the clerks to minute the proceedings of the court, so they give the finishing stroke to the same, by extracting the decrees, acts and ordinances of the court; these are prepared, and wrote out by their office-servants, called Extractors. This is a business that requires skill and knowledge to perform it accurately. An extract is "a fair copy of the proceedings of the court, digested in due order, and authenticated by the clerk's subscription." After a decree is extracted, the cause is out of court, and it becomes *res judicata*, which it is not till then. Extracts of all decrees, acts and protestations must, upon application of the parties, be given out within 24 hours after they are read in the minute-book^d, which contains a short note of the same. The extractors were put under certain regulations, by act of sederunt, as to their management^e. Two copies must be prepared of all decrees and sentences, both which are to be signed by the clerk; one of them is to be kept for the record, and the other to be given to the party^f.

^d Act of sed.
Nov. 11.
1708.
^e Act of sed.
Nov. 28.
1682.

^f Act of sed.
July 26.
1738.

8. Clerks to
other courts.

CLERKS to other courts officiate in them, in relation to the proceedings therein; which they must fairly take down in writing, and extract the acts and decrees of the judges. Those of sheriff-courts must

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must be notaries ; and, by an old statute, their books behoved to be marked by the lord clerk-register, as the books of other notaries, and the authentic copies were to be reported yearly, to remain in the king's register ^a. They are appointed by the king, tho' antiently the sheriffs did name them ^b; and they were to be examined and admitted by the court of session ^c.

^a P. 1597.
c. 275.
^b P. 1587.
c. 81.
^c P. 1540.
c. 78. act of
fed. July 29.
1680.

As the proceedings in all courts were antiently to be enrolled, and afterwards were ordained to be engrossed in books, and so to remain on record, I conceive that clerks of all inferior courts, even those of barons, ought to be notaries, that they may give out extracts of instruments taken in their hands, as they may extend such instruments upon other occasions ; for I find this required by several statutes ^d ; in the last of which, baron-courts are expressly mentioned among others. The learned Craig is not only of this opinion, but likewise mentions a decision of the court of session, where they reduced a baron-decree, because the clerk of court was not a notary ^e. But, in a proper sense, they are not courts of record, in as much as writings cannot be therein registred, in virtue of a clause of registration contained in them, so as execution shall proceed on the extracts, or the same be probative, as in deeds duly registred in other courts.

^d P. 1540.
c. 78. 81.
^e Lib. 3. di-
c. 7. § 2.

9. Clerks to all inferior courts must be notaries ; how far extracts out of their books good.

To return to the clerks to the signet. They are admitted by presentation from the secretary or lord keeper of the signet, upon a trial of their sufficiency, before certain of the commissioners appointed for that purpose. They are sworn at their admission to execute their office lawfully and diligently, and not to reveal what they write or do for their employers ^f, and take the oaths to the government. Their fees are taxed by the act of regulations 1672, but which are generally thought to be much too low at present, considering the great increase of the price of things. The clerks to the signet prepare and sign all signatures presented to his majesty, or past by the barons of exchequer, in order to charters or other grants or gifts from the crown. They were privileged by statute to be the only clerks to appraisings deduced in Edinburgh by dispensation ; and are to services of heirs, carried on before the macers ^g. They must observe the ordinary stile in signatures and letters ^h. All writs that pass the king's signet must be first subscribed by a writer as clerk to the signet, as above ; except letters of diligences in processes before the court of session, which are to be subscribed by the clerks of session ⁱ ; and summonses and diligences before the commission for plantation of churches, which are to be subscribed by the clerk to the commission ^k.

^f P. 1537.
c. 59.

10. Clerks to the signet how admitted ; their business and duty ; they are a branch of the college of justice.

^g P. 1672.
c. 16. § 33.
^h P. 1584.
c. 13.

ⁱ P. 1540.
c. 81.

^k P. 1707.
c. 9.

THE writers or clerks to the signet are a considerable branch of the college of justice ^l, and compose an honourable body under one of the secretaries of state, or the lord keeper of the royal signet for Scotland, when there is such distinct office, (which is the case at present) and they are properly clerks in the secretary's office. The deputy-keeper of the signet, in the right of the secretary, or of the principal keeper, presides in all their meetings ; and, together with the commissioners of the signet, appointed by the secretary or principal keeper, is intrusted with the administration of the affairs of the society ;

^l P. 1594.
c. 220.

11. They are a branch of the college of justice, and a corporation. Their constitution, and business of their meetings.

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society; the trial and punishment of delinquent members, the management of the common stock, and the examination and admission of intrants. The clerks to the signet, long since, have not had any concern in officiating as clerks of session, who have been long under the foresaid regulation; but they still write the above bills, which are presented to the ordinary by the clerk to the bills; besides their peculiar province in relation to signatures, and expediting letters under the king's signet, exclusive of all others. They practise in writing securities and conveyances, which is a considerable part of their business. But others likewise skillful in those matters do it: for there are a great many other writers who profess that employment, tho' they are not writers to the signet; and those also conduct processes or actions before the court of session, and without them, law-affairs could not be carried on to any purpose.

12. The society of clerks to the signet of antient standing.

THE clerks to the signet were of antient standing; for they are mentioned as an established society at the institution of the college of justice^a; and reference is made to their fees as settled in James IV.'s reign^b.

^a P. 1537.
^c 59.
^b Ibid. c. 60.

SECTION II. *The Registers.*

13. The records or registers of parliament, and other courts.

RECORDS or Registers are of various kinds. Those of our parliaments were, no doubt, of the greatest importance. We find, that antiently the proceedings were wrote on paper rolled together^c: hence they were called *Rotuli Parliamenti*, Rolls of Parliament; but thereafter they were appointed to be put in register-books^d. The courts of session, commission, and justiciary have their records. There is likewise a record in the exchequer, called the Treasurer's Register, in the act of regulations 1672, concerning the exchequer. The court of admiralty, commissar-courts, and sheriffs and stewarts courts, have records of their proceedings. All those records are under the care of their respective clerks, who write them, and are intitled to give extracts of the same. Those of old obtained their commissions from the lord clerk-register, who had the charge of the records of parliament, and all other clerks derived their immediate authority from him; but now their commissions are granted directly by the king. The records of parliament, and all other records, rolls and registers whatsoever, are secured by the treaty of union^e, to be kept in all time thereafter as they then were.

^c Skeen, verbo (record.)

^d P. 1469.
^e 39.

^e Art. 24.

14. The office of the king's chancery; the director, and other officers thereto belonging.

THE chancery is a record of antient standing. It is called in Latin *Capella Regia*, or the King's Chapel, taken, as I apprehend, from the usage in the Romish church, of religiously preserving the reliques of the saints in a place called *Capella*^f; for in it the king's charters, patents, and all other writings appointed to pass the great seal, are wrote and recorded, and the warrants of them carefully kept. Baillies of regality had their own chapels, where services in lands holden of them were recorded, and needed not be retoured to the king's chancery^g. From the king's chancery of old, all original writs in the king's name, to commence actions at law, proceeded^h, and those which still continue do issue out of the same. The business of this office is under the superintendency of the director of the chancery,

^f Spelm. gloss. (capella.)

^g Decem. 8.
1631. Cliesh.
^h P. 1429.
^c 113.

^a P. 1672.
c. 7.

^b Ibid.

^c Leges Malc.
II. c. 2. stat.
Rob. III.
c. 1. § 3.
^d Rolls of
parl. ad ann.
1487, 1526,
1533.
^e Commis-
sion, July
1633. record
in chancery.

^f P. 1617.
c. 16.

^g P. 1669.
c. 9.

^h P. 1581.
c. 119.

chancery, who is the principal officer; and to him and his deputy is committed the king's quarter seal, under which all precepts of seisin of lands holden of the king, did antiently pass, when they were on a writing distinct from the charter, which was altered by statute, and the precept ordained to be engrossed in the charter^a; but divers other writs and precepts must still be sealed by it. In this office, by the same act, all charters, &c. that pass the great seal, must be wrote out by the clerk of the chancery, and recorded there before they are given out to be sealed^b. The director and his clerk have a great trust; they must revise services of heirs, and, if disconform to the original infeftments, may cancel them; but otherwise they issue precepts thereon: and they have much other business in adjusting the Responde-book, by which all the sheriffs are to account to the crown for the non-entry, and other duties exigible from the heirs of vassals at their entry, &c. It is thought by some, that the director of the chancery was originally clerk to the lord high chancellor, which they found on certain of our old laws^c. But the director came afterwards to be highly advanced, and was one of the officers of state; for, as such, he is mentioned as sitting in parliament with the other officers of state^d; but this came to be discontinued^e. The lord chancellor of Scotland, long before the union, had no concern with the chancery, nor had the director of it any dependence on him, but received his commission from the king, as he does at this day.

THE records already mentioned are not peculiar to this country; for similar ones obtain in every well governed state. But such as those I am now to discourse upon, which concern rights of lands, and incumbrances thereon, are not to be found in the same perfection any where else that I know. Registers of deeds, or instruments in relation to lands for publication of the same, that purchasers or creditors might take notice of them, were established by the excellent statute 1617^f. This act ordains, That all reversions, assignations thereof, or discharges of the same, renunciations of wadsets, grants of redemption, and instruments of seisin, be registred in the general register at Edinburgh, or in the particular register of the shire where the lands to which they refer lie, within 60 days after the date of the same. But reversions need only be registred within 60 days after seisin taken upon the disposition of the lands which they concern. And any of the said writings, not duly entered in the record, as above, are declared void, so far as they are in prejudice of a third party; but not as against the maker thereof and his heirs. And by another statute, instruments of resignation *ad remanentiam*, whereby lands, in effect, as to the property, are conveyed to the superior, of whom they are holden, must be recorded within 60 days of their dates, in the same register, or otherwise to be null^g.

INTERDICTIONS and Inhibitions, which likewise concern lands, as disabling the fiars, against whom they are used, to grant away or burthen such lands to the prejudice of their heirs, creditors, or others interested, at whose suit they are served, were, by a former statute, ordained to be registred within 40 days of the execution thereof^h. Those must be recorded either in the general register at Edinburgh, or the particular register of the county where the party resides, and

15. The recording rights affecting lands introduced by the act 1617. This must be done in due time. This either the general register, or the particular one in each county.

16. The registration of interdictions, inhibitions, hornings, and relaxations from the same; and allowances of appraisings

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and adjudications must be done within the respective times thereto limited.

where his lands lie. And letters of horning and executions thereof, whereby lands were affected by escheat, even when used for civil causes before the late statute^a, and relaxations from the same are likewise ordained to be registred within 15 days of executing the same^b. And lastly, allowances of apprisings were appointed to be registred within 60 days after their date^c, which is the case of abbreviates of adjudications that came in their place^d. In all those cases, the principal deeds or instruments are given back to the parties after they are recorded.

^a 20 Geo. II.

^b P. 1579.

^c 75.

^c P. 1661.

^c 31.

P. 1672.

^c 19.

^d Regul.

1695. act 24.

17. Purchasers of lands, or land rights, secure, if they consult the records: the writings must be registred in the order they are presented.

WHEREFORE purchasers of lands in Scotland, or persons who lend money on land-security, may easily know the condition of the party with whom they are contracting, and which is mentioned in the preamble of most of those statutes, as the inductive cause of them. All that they have to do, in order to discover the incumbrances to which such lands are subject, is to search both the general register in Edinburgh, and the particular register of the place where the lands lie, and of the debtor's residence; for if they are not found recorded there, they are not to be considered as Incumbrances, in a question with purchasers and creditors. And, for their greater ease, the keepers of the above-registers must have a minute-book, and therein express the day and hour of presenting the writings to be registred; which, with the name and designation of the presenter, must be signed by him and the keeper, and be patent to all persons *gratis*. And the writings must be registred in the order in which they are presented, under the pain of deprivation of the keeper, upon his neglect, besides being liable to the party's damage that incurred thereby^e. The necessity of registering those instruments is for intimation or notice of the same, and is performed without the interposition of any judge.

^e P. 1695.

^c 14.

18. Registering bonds or deeds in order to personal diligence. This register likewise useful, in order to discover the credit of persons. This either general or particular.

QUITE different from those records are the registers serving in order to personal diligence. The registration of deeds in these hath the form of a judicial proceeding, by a fiction of law; for in reality no judge is present. Decree proceeds summarily by registering one's obligation in any competent court, pursuant to his consent, by the clause of registration contained therein; the extract of which obligation, made out and signed by the clerk of the court, is the decree of registration against the granter of such obligation. In this case the principal deeds are retained in the record, as the warrants of the extracts or decrees thereon. Such registration, in order to execution, can only be against the party himself; but may be done after his death, so as the principal shall be securely kept, and the extract be probative^f. One of these last mentioned registers is the General register in the books of the court of session, which extends over all Scotland; and the other is the particular register in each county, and serves in order to personal diligence against all the inhabitants there, and for affecting their moveables, by poinding or arrestments, upon proper writs issued for that purpose. Those are not only useful to found summary execution against the granters of such registrable writings; but likewise in order to discover the circumstances of persons: for a man of credit will not submit to his bond or obligation's being registred against him for personal diligence, but will pay the debt,

^f P. 1696.

^c 39.

debt, and so prevent it. And therefore, when such measures are a-taking against any man, his credit is presently suspected, and every other person that has his bond or obligation is sure to follow the same course.

THE clerks of session are entrusted with keeping the registers of such writings as are recorded in the books of session, in the same manner as they are with the other records of that court; and the clerks of other courts, with the registers of these respective courts. And all keepers of such registers ought to deliver their register-books to the clerk-register, or his deputes, to be put and kept in the general register-house in Edinburgh; and they are only to hold 10 years records in their own hands, for the use of the lieges. Writings given in to be registred may be taken out again within six months after ingiving thereof, but not after they are booked^a. Such writings may be thus retired out of the record, either by the ingiver, of his own accord; or by the debtor, upon his shewing a discharge of the obligation, which is advisable to be done to save his own credit.

^a P. 1686.
c. 33. 38.

THE clerks of inferior courts are prohibited to register in their books any writings where the court is not competent, on pain of deprivation, and a fine of 500 merks, the one half to the king, and the other to the prosecutor; and the decrees of registrations incompetently made, and all diligences thereon, are declared void^b. I shall have occasion to discourse upon registration of writings, in order to decrees and diligence, more at large hereafter^c.

^b P. 1685.
c. 38.
^c Inf. tit.
(decrees).

FOR the security of deeds, or probative writings, wherein a clause of registration was neglected to be insert, a register was appointed by statute for recording them^d. But in that case, the principals are given back to the party to whom they belonged, and the only security he has is, that he may keep in his own hands the principals, and make use of the extracts in processes, or otherwise, as occasion requires. Whereas, if the act had appointed, that the writings themselves should be left in the register, they would have been better secured. Wherefore it is still advisable, that a clause of registration, for Conservation, be insert in these writings whereon diligence is not competent, or not intended to proceed, as discharges, &c. For thereby the deed may be recorded in the common register, in the same manner as in that for probative writings; and the deeds themselves are left in the record, in virtue of the clause of registration, which is a farther security.

^d P. 1696.
c. 26.

THERE is another register, of no small importance, different from all those above mentioned, viz. that for recording tailies, with strict irritant and resolute clauses^e. In order to obtain such tailie recorded, a petition must be presented, by the party interested, to the court of session, together with the principal deed of entail, Praying their authority may be interposed thereto, and that the same may be recorded, as the statute directs. It ordains, That the names of the maker of the tailie, and of the heirs of entail, and the general designation of the lordships and baronies, with the provisions and conditions contained in the tailie, and the irritant and resolute clauses thereto

^e P. 1685.
c. 22.

19. The duty of the clerks of session relating to the registers. How may writings be got up out of this register.

20. Extracts out of an incompetent court-book void; and the clerks who register the writings punishable.

21. The register for probative writings.

22. The register for tailies.

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thereto subjoined, be insert in the record and register-book kept for that purpose. Here the judicial authority must be really interposed, and not by a fiction only, and in it the court acts a ministerial part; it serves to perfect the tailie, and for notification of the same.

23. Can the heir in possession be compelled to register the tailie at the suit of the next substitute.

It may be questioned, Whether such tailie can lawfully be recorded, after the death of the maker, so as to have the same effect as if it had been done before; and if the next substitute can compel the immediate heir of entail to record the same in that register, to complete it; since, unless it be recorded there, the statute expressly declares, that the same shall not be regarded: as likewise, to record it in the public register, for the security of all the heirs of entail therein concerned. It may be contended for the heir, that at the time of the act 1685, and till the act 1696, procuratories of resignation, containing tailies, fell by the granter's death; and that therefore the statute intended, that the tailie should be registred in his life; and that the next substitute has no interest to compel the heir to record it, more than he could oblige him to serve heir of entail. However, the answer to both seems to be, That tho' the procuratory of resignation, so far as it is a mandate, fell before the act 1696, by the party's death, yet the right still subsisted, and all the use of the procuratory was for the more ready expediting the charter upon the tailie. And therefore it was as much competent and necessary to record the tailie, after the granter's death, as before; and that the heir was compellable to do it at the suit of the next heir, for securing his interest in the estate. And, as to the making up titles to the estate, tho' the next heir cannot be compelled to do it, yet, after the tailie is duly recorded, his debts, tho' he shall be three years in possession as apparent heir, cannot affect the estate by the act 1695, more than if he had entered to the same, and the irritant clauses had been ingrossed in his infestment. And such recording, at the instance of substitutes, hath been commonly sustained, even after the death of the tailier ^a.

^a June 15. 1646. Oliphant, &c.

T I T. V.

Notaries or Notars.

1. Notars either imperial or papal of old; thereafter made regal: admitted at present by the lords of session. Must they be presented by the king.

BESIDES clerks of courts, there are divers other notars or notaries thro' the kingdom. They of old had their authority from the Emperor of Germany, or the pope; the first were called Imperial or Laic, and the other Papal or Spiritual Notars. Those created by the emperor were discharged to exercise the office in time coming, unless they were examined by the ordinary, *i. e.* the bishop of the diocese, and approved by the king: it being deemed an usurpation in the emperor of Germany to impose notaries upon our king, "who had full jurisdiction and free empire within his realm, and " might make notaries, whose instruments should have full faith " in all causes and contracts civil within the realm," as the preamble of the statute sets forth^b. Public notaries made by the emperor, claimed likewise the privilege *de jure* to exercise their office in England; but because it was against the dignity of the king who was sovereign, they were prohibited by the king's writ^c.

^b P. 1503. c. 64.

^c Coke 4. inst. 342.

At

AT present, and a long time since, notars are admitted by the lords of session, on a petition for that purpose, who appoint two of their number previously to examine them^a. In the attests of notaries, they are designed as created by the royal authority, in opposition to the antient custom of pretending to have their authority from the emperor or pope. And indeed, while such usage took place, the notars, that were found by the ordinaries worthy of the function, were to be sent to the king to be made Regal^b, that is, as I conceive, to be admitted by his majesty. At this day notaries, in their admission by the court of session, are said to be presented by the king, tho' no such presentation ever is obtained or applied for: but the lords lately, on a petition from the clerk to the notars, ordained, that, for the future, none should be admitted to trial, till they obtain from him a presentation. The creation of notaries, by the lords of session, is founded on express statutes^c. But, of old, the imperial or laic notaries were examined, and admitted to the exercise of their office by the sheriffs of the bounds; and the spiritual or papal ones by the bishops of the diocesses where they practised^d.

^a Act of sed.
July 30.
1691.

^b P. 1469.
c. 30.

^c P. 1551.
c. 24.
P. 1563.
c. 78.
^d P. 1540.
c. 76.

NOTARS, at their entry, give their oath for the faithful administration of their office, and qualify by taking the oaths to the government. They receive from the clerk to the notaries, (who is one of the lord-register's depute-clerks, but named by the king) a Protocol-book, wherein they ought to insert, with their own hands, all instruments of seisin, or others of great moment, under pain of 100 l. Scots, and deprivation upon their default. They find caution for the due execution of their office, and to indemnify those that are leased by their instruments. And it is enjoined, that their widows or executors shall report to the clerk to the notars their protocol-book, within 15 days after their death^e; for which purpose they may be charged at the instance of the said clerk, as likewise may their cautioners^f. They must use always the same Sign and subscription-manual without variation^g. There is so much of the old stile, from their being antiently tried by the ordinary or bishop, retained, that they still design themselves of some diocese, such as they choose. But they may act anywhere else, with the same freedom and authority within the kingdom; but without it they have no privilege, more than those who gave them their commission.

2. What incumbent upon notaries at their entry, and on their executors; their protocol; must always use the same sign-manual; are designed of some diocese.

^e P. 1587.
c. 45.
P. 1617.
c. 22. act of
sed July 20.
1691.
^f Act of sed.
July 29.
1680.
^g P. 1540.
c. 70.

THE office of notaries is to form writings and securities, to admit and extend instruments when taken in their hands, and to subscribe deeds for persons that cannot write. And because many charters and precepts are in Latin, and regularly the instruments of seisin thereon ought likewise to be so, they ought to understand that language^h. They ought to know the nature of contracts, obligations and securities, that they may be capable to make them in good form; otherwise they will be liable to indemnify the party leased, in case the contract is null, thro' want of the ordinary solemnities required by lawⁱ. When they subscribe for parties that cannot write, they ought either to know them, or have it declared to them by the witnesses, or other credible persons, That the parties for whom they subscribe are those designed in the writing, and their subscription ought to bear it^k.

3. The duty of notars in subscribing for persons, and making out their instruments.

^h P. 1587.
c. 45.

ⁱ Act of sed.
July 21.
1688.

^k Arg. Neut.
decif. 79.

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4. Co-notars,
their duty.

WHEN two notaries subscribe writings of importance, for parties that cannot write, they ought to design themselves Co-notars, or, at least, he that subscribes last ought to design himself Co-notar; for they must both be present, and subscribe at the same time before the four witnesses^a. It is the opinion of the learned Craig, that a father and son cannot be co-notars, subscribing for a party, nor two brothers, or an uncle and a nephew, nor good-father and good-son^b. This seems founded on good reason, the great design of adhibiting two notaries being to prevent falsehood, which, and the four witnesses, who are required to writings of importance, present at the time, are a safeguard against all bad practices whatever.

^a Decem. 27.
1711. White.
^b Feud. l. 2.
dieg. 7. § 10.

5. The punishment of
false notaries.

THEY who usurp the office of notars, or make false instruments, are punishable as guilty of falsehood, by escheat of moveables, amputation of the right-hand; and, in case of atrocious circumstances, by the pain of death^c.

^c P. 1555.
c. 44. act of
fed. July 21.
1688.

6. What instruments of
notars are
probative of
themselves;
and what
must be supported by
the witnesses.

SUCH instruments of notars as are necessary for completing rights, or are solemnities authorised and required by law, are probative by themselves, unless improven; such are instruments of seisin and of resignation, instruments of requisition and premonition, intimations of assignations and protests of bills: for it would create great danger and inconveniency to parties, if they were bound to prove those several matters, otherwise than by the instruments. Nor will it annul such of them as ought to be insert in the protocol book, that they are not therein filled up, that neglect only inferring a penalty upon the notary. But other instruments and protests taken by parties, on sundry occasions, in evidence of facts and circumstances attending any procedure of the parties, in doing or forbearing any thing, or to put the other party in *mala fide*, by notifying to him certain particulars in that solemn manner, are not probative of the facts therein set forth: but regularly must be supported by the oaths of the notary and witnesses.

7. Some instruments of
notars must
be duly subscribed by
the witnesses,
others need
not; but advisable to be
done.

THE statute^d only requires, that instruments of seisin, of resignation *ad remanentiam*, and intimations of assignation, translations or retrocessions, shall be subscribed by the witnesses insert; and therefore the other instruments and protests need not be subscribed by them; but it is advisable to be done, that the truth of them may be the more surely verified by the witnesses, who may otherwise forget that they were adhibited thereto. Contracts and securities wrote by other persons than notaries are good, (if duly subscribed) and are equally authentic.

^d P. 1681.
c. 5.

8. The notary's attest,
in respect to
facts, extraneous to the
parties subscription,
not probative.

WHERE notaries subscribe for parties, the act of subscribing only is performed by the notary, as such; and therefore, whatever he attests, at his subscription, foreign to that, as That the party is of sound judgment, or in perfect health, or the like, is not to be regarded; for in that respect he is only a private person, and not acting in the capacity of his office.

9. How far
the instruments of one

If one that acts as notary never had a commission, all the deeds signed by him are declared null by statute^e, as being without authority.

^e Q. Mary
P. 5. c. 14.

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thority. Whether, if he was commonly reputed a notary at the time, and was always acting as such, his instruments shall be sustained, the act makes no distinction; but I should think, that for the common good, they ought to be regarded, after the example of Barbarius Philippus^a. If one was truly created notary, but laboured under some disability, or was afterwards deprived, his actings are undoubtedly good, if he was generally holden and reputed a notary, and in the exercise of the office^b; unless his deprivation was published at the market-cross of the head-borow of the shire where he officiated, and the same advertised in some public news-paper^c; because otherwise people would be ensnared.

^a L. 3. ff. de off. prætor.

^b D. l. 3. ff. de off. prætor. P. 1563. c. 78. ^c Feb. 18. 1732. Hunter.

officiating as notary, but never admitted, or who was admitted, and thereafter deprived, good.

MINISTERS were in use formerly to officiate as notaries in all cases, but they were afterwards discharged, under pain of deprivation, except in testaments^d. I have made some farther observations upon the duty of notaries elsewhere^e, which I shall not repeat.

10. Testaments signed by ministers for parties, good.

^d P. 1584. c. 133. ^e B. I. tit. II. § 40, &c.

T I T. VI.

Macers, Messengers and Officers.

OTHER retainers to courts, or attendants thereon of inferior rank, are Macers, Messengers and Officers. In place of messengers, there were of old Mairs, and many of them had their offices in fee, or hereditary; and, being quite ignorant of their business, were obliged to name sufficient and able persons for their deputies, whom the respective sheriffs should authorise^a. But afterwards Messengers succeeded those mairs, and were created by the Lyon king at arms. They execute all summonses before the lords of session and justiciary, and other letters and writs under the signet in the king's name. They are termed *Officers at Arms*, because they bear the king's arms, impressed on a brass or silver-blazon fixed to their breast. They ought to be provided with a Horn, to denounce persons rebels, upon letters of horning; and with a Wand^b or Batton, wherewith they relax persons denounced from the horn, upon letters of relaxation, and receive them into the king's peace, of which the wand is an emblem. With this wand they likewise touch persons whom they apprehend upon letters of caption, after which they become their prisoners, and must remain peaceably with them till they are committed to prison.

^a P. 1426. c. 99. P. 1429. c. 111. stat. Dav. II. c. 51.

^b D. P. 1426. c. 99. P. 1587. c. 46.

1. Mairs, of old, in fee; afterwards messengers were appointed in their place: they are created by the lord Lyon. Their office; why called officers at arms; their horn and wand.

OF old, letters and summonses, in the king's name, were directed to sheriffs, stewarts and baillies of regalities, who were bound to execute them, but which thereafter were served by their mairs and officers^c. However the writs or process out of exchequer must still be executed or served by the sheriffs and stewarts, or their deputies. And, by the institution of the college of justice, the decrees of the court of session were to be executed by the sheriffs or stewarts, and their deputies, within whose jurisdiction the defenders dwelled; or by heralds, pursuivants or macers^d. Hence letters and writs in the king's name are directed to *Sheriffs in that part* in general, viz. any messenger the pursuer thinks fit to employ, who, in executing the letters, officiates for the sheriffs and other judges foresaid.

^c P. 1469. c. 32. P. 1540. c. 74.

^d D. P. 1469. c. 32. P. 1537. c. 58.

2. Summonses, &c. were of old executed by sheriffs and stewarts; but afterwards directed to messengers, as sheriffs in that part.

FORMERLY

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3. The first and second summonses, how proceeded in of old; afterwards these taken away, and citation given at once to first and second diets, now sufficient.

FORMERLY, before the court of session, where the pursuer could not instantly instruct his libel, first and second summonses were necessary; and after the first was executed, and the diet of comparance elapsed, an act of continuation behoved to be granted, and thereupon second summonses raised and executed, before he could proceed in his cause. The first might be executed by any person, as officer or sheriff in that part, but the second summons behoved to be served by a messenger. Those acts of continuation were discharged as expensive, and giving unnecessary delay to the pursuer, and the summons was thereafter to contain two several warrants for citing the defenders at two different times, and to two distinct diets of comparance: the second citation to be used after elapsing of the first diet, and by a messenger^a. Thus acts of continuation were taken away, but still the expence and delay of two citations remained. Wherefore, for the more speedy dispatch of business, and ease of the subjects, it was declared lawful to give citation at one and the same time, for both first and second diets of comparance, by a messenger at arms^b; and this obtains at this day.

^aP. 1672.c.6.

^bP. 1693.
c. 12.

4. The citation to the first and second diets regularly on 21 and six days; the form of serving it.

THE citation to the first diet is on 21 days; and this single diet of comparance was alone necessary, where the summons was instantly verified, and there needed in that case of old no act of continuation; but otherwise, there must be a second diet, which is upon six days. This is the rule as to persons within Scotland. And the citation must be either, by delivering to the defender a full copy of the summons, with the citation or charge thereto subjoined, in presence of two witnesses, bearing their names and designations, and signed by him; or leaving such copy at his dwelling-house, with his wife, children or servants, if he gets access; or otherwise, by leaving it in the lock-hole of the door, or fixing it thereto, after knocking six several knocks, when the party cannot be personally apprehended.

5. A domicile, how constituted.

A DOMICIL may be constituted, by one's stay in a place 40 days, in order to sustain a citation given him there; but not to warrant a denunciation of him to the horn; or publication of letters of inhibition at the head-burgh; or confirmation of his testament before the commissars there; for, as to those, his dwelling-house, where he resides with his family, must be regarded^c.

^cNov. 20.
1672. Paterson.

6. Executions against persons out of the kingdom; or who have no dwelling-house, or no safe access to it.

IF the party is out of the kingdom, (and England, as to judicial matters, is still esteemed a foreign place) he must be cited on 60 days for the first diet of comparance, and 15 days for the second, and the summons must bear a warrant for that purpose. And the execution must be, by affixing a copy at the market-cross of Edinburgh, and another at the pier and shore of Leith. If he has no dwelling-house, or there is no safe access to him, or the messenger is forcibly kept out, on a petition to the lords, warrant will be granted by them to cite him at the market-cross of the head-burgh of the shire, where he ordinarily resorts, or has his dwelling-house, with certification, That he shall be holden as confessed, if he does not appear^d. In all citations at market-crosses, called Edictal, the crying three several Oyeses must precede, and the execution must bear that it was so done, the

^dJuly 5.
1670. Lindsay.
Nov. 22.
1712. Montrose.

the use of which is to advertise the people to attend, *Oyez* being a French word, importing *hear* or *bearken*.

THE execution of the messenger must set forth the warrant, the citation of the defender, and the order in which he does it, the date of delivery, or leaving of the copy, the names and designations of pursuer and defender, and of the witnesses thereto, and be subscribed by him and the witnesses. The copy must likewise be signed by the messenger, but the execution cannot be redargued by the copy, it being unreasonable, that the messenger should have it in his power to invalidate his execution in that manner.

7. The form of executions.

AN abuse had prevailed, of the messenger and witnesses signing executions blank, and trusting them to the doer for the party to be filled up. But this was justly discharged, as a pernicious custom of dangerous consequence, by act of sederunt^a, which declares, That all executors of summonses, or of any letters or diligences whatsoever, signed, by the executors or the witnesses, blank, shall be void and null, to all intents and purposes, and the executor of such shall be deprived, and incapable of the office thereafter; and he and the witnesses are declared infamous, and all persons are prohibited to fill up such blank executions upon their peril.

8. The signing blank executions discharged, under severe penalties.

^a Act of fed. June 21. 1704.

OF old, the executions of messengers behoved to be stamped with their signet^b, till the statute, which obliged them to sign their executions without necessity of stamping^c. Formerly, only executions of inhibitions, interdictions, hornings or arrestments, and for interruption of the prescription of real rights, behoved to be subscribed by the witnesses thereto specially designed therein. But now regularly all executions of summonses, whether before the lords of session or justiciary, or inferior courts, must have the same solemnities above mentioned, otherwise they are null^d. As also, the copies to the parties ought to bear at length, and not in figures, the date of the delivery, and the names and designations of the witnesses to the execution, upon pain of deprivation of the messenger. But that omission will not annul the execution^e. Executions, when formal, bear full faith, and cannot be redargued, otherwise than by improbation, either with respect to the facts therein recited, or as to the subscriptions of the messengers or witnesses; because they are deeds of persons vested with public authority, for that purpose, and in the exercise of their office. I shall take notice of other matters concerning summonses hereafter^f.

9. Executions must be signed by the messenger and witnesses; they bear full faith, unless improven.

^b P. 1409. c. 32. P. 1540. c. 74. ^c P. 1686. c. 4.

^d D. P. 1672. c. 6. P. 1681. c. 5.

^e P. 1693. c. 12.

^f Inf. tit. actions at law, &c.

THE judge-ordinary, justices of peace, and magistrates of borows royal, within whose bounds any legal diligence is used, are to modify or tax the charges or fees claimed by messengers, upon complaint of the parties, either for or against whom the messengers were employed^g. This will be easy now, since the court of session, on a complaint of an excess in that respect, have made an act of sederunt, regulating their fees in most cases^h. And because they frequently extorted from debtors, especially those in their power, under caption, exorbitant fees, they are to receive the same from the creditor their employer; and if they exact any from the debtor, they are guilty

10. The judge-ordinary, justices of peace, and magistrates of borows, ought to tax the messengers fees. In poindings they are limited to the 20th part of the sum

^g P. 1685. c. 35.

^h Nov. 1749.

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poinded for:
hence sen-
tence-money
may have
taken its rise.

of oppression; and, on a summary complaint before the court of session, will be assessed in high damages and expences to the party aggrieved, and subjected to a fine and deprivation, or other arbitrary punishment, for such offence^a. In poindings, their fee is expressly taxed to the 20th part of the sum distrained for^b, called the Sheriff-fee. It refers to sheriffs ordinary, as well as sheriffs in that part, or messengers: hence, I conceive, the exaction of sentence-money, in all causes before sheriff-courts, had its rise, which is now justly discharged^c.

^a Nov. 4.
1740. Mon-
ro.
^b P. 1503.
c. 66.

^c 20 Geo. II.

11. The punishment of messengers convict of falsehood or oppression. The Lyon's court judge of their malversations in office, but not as to parties damages thereby leased.

MESSENGERS convict of falsehood or oppression, in the execution of their office, are liable to the pains of death^d. They ought to be men of discretion, honesty and credit. They find caution, at their admission, for the due execution of their office, under the pain of 500 merks, whereof two thirds to the king, and one third to the lord Lyon, and for all damages and interest of parties grieved by their falsehood and negligence, or informality of their executions^e. The Lyon, and his brethren heralds, are judges to the malversation of messengers in their office, so far as concerns their deprivation or suspension, and forfeiture of their bond of cautionry; but not to any other punishment, nor even to the damages of parties incurred thro' their misbehaviour; because no such jurisdiction is given to the Lyon's court^f. The court of session may likewise deprive messengers, or otherwise punish them, where their malversation appears in complaints before them^g, as above.

^d P. 1587.
c. 84.

^e P. 1587.
c. 46.
P. 1672.
c. 22.

^f June 27.
1673. Heriots. P. 1587.
c. 46.
P. 1672.
c. 21.
^g Acts of sed.
p. 285. deprivation of Ross messenger.

12. The lord Lyon called King of, or, at Arms; his office as to coats of arms; his court; the heralds and pursevants principal officers at arms.

THE lord Lyon is designed King of, or at Arms; because he has the sole power and jurisdiction concerning coats of arms, or signs armorial: and it is specially ordained, that they be matriculated in the Lyon's register. And he may give the privilege of them to any that he judges has right to claim the same, either by birth or merit, or on other accounts; and may inhibit all common people, unworthy, by the law of arms, to bear any signs armorial, from using them; and if, after such prohibition, the person inhibited wears or uses them, he is liable to the Lyon in an 100 *l.* of fine, *toties quoties*, and in a forfeiture to the king of all the moveable goods whereon such arms are engraven, or otherwise represented; and all magistrates may be charged to assist the lord Lyon in putting the acts in his favour in execution^h. The lord Lyon, heralds, pursevants and macers, being seventeen in all, are the principal officers at arms, and one of them must execute charges of treasonⁱ. As the jurisdiction concerning all bearing of arms belongs to the Lyon and his brethren heralds, so the admission and deprivation of messengers at arms is annexed thereto.

^h P. 1587.
c. 46.
ⁱ P. 1592.
c. 127.
P. 1672.
c. 21.

13. The office of feciales, or heralds among the Romans.

THERE are divers conjectures concerning the institution of heralds, and more especially why the chief of them is honoured with the high title of King of, or at arms. They were called *Feciales*, and were priests among the old Romans, and instituted by Numa Pompilius, the most renowned of their kings. Their business was to proclaim war, and mediate peace between the Romans and other sovereign powers. Their office is described at large by two great authors^k.

^k Dionys.
Halic. lib. 2.
Cicero. lib. 2.
de legibus.

THE

THE above is the most probable reason of the lord Lyon's being called king of arms that occurs to me. But some authors are of opinion, that the principals of the heralds are designed kings of arms; because, in some measure, they represent the sovereign; and a kind of ceremony of crowning them, at their admission to the office, is used by the lord marshal of England, and they are adorned with a sort of royal ensigns; and hence it is thought, that there ought to be but only one king at arms. This is the case with us, as above: but in England there are three kings at arms, *viz.* Garter, Clarentieux and Norry. The learned English antiquary has a long dissertation upon the institution and office of heralds ^a.

14. Various conjectures touching the designation of the principal of the heralds, *viz.* as to that of king of arms.

^a Spelm. gloss. (heraldus)

MESSENGERS formerly were restricted to a certain number, and proportioned among the respective shires of the kingdom ^b. But that limitation is not observed; and the execution of a messenger, tho' not within the jurisdiction where he ordinarily resides, is good. If the messenger is exauctorated by the Lyon, and his deprivation published at the market-cross of the head-burgh of the shire where he resides, and intimation made thereof, by advertisement, in some authentic news-paper, his executions thereafter are void, that being all that is possible to be done, in order to certiorate the lieges ^c: but otherwise, if a messenger deprived continues notwithstanding to exercise the office, his executions will be sustained. Where the messenger's deposition is published and intimated, as above, the party that inadvertently employs him, acting as messenger, tho' deprived to execute letters of caption or poinding, will not be liable in a riot or spuilie, but the diligence will only be annulled: however, it is lawful to resist him, without hazard of deforcement, in the same manner, as if he had never been created a messenger, he being divested of the character by the deprivation. All messengers, and other officers of the law, must take care not to serve any summons, or other letters, upon Sunday, or any holy-day appointed by lawful authority; for not only are such executions void ^d, and may be resisted, but likewise they incur the penalties in the several statutes, against profanation of the Lord's-day, if done on a Sunday.

15. Messengers formerly limited to a certain number, but not so now. How far a messenger deprived, continuing to exercise the office, his executions good. It is lawful to resist such executions, or those upon Sunday, or other holy-day, and the executions are void.

^b P. 1587. c. 46.
^c Feb. 1732. Hunter. Hume dict. v. 1. p. 201.

^d L. ult. c. de fer. Feb. 9. 1622. Mortimer. Feb. 3. 1663. Oliphant.

MACERS before the courts of session, justiciary, exchequer and admiralty, attend them in court, and execute all their orders in and about Edinburgh. The macers before the session are sworn to execute their office diligently, and to reveal nothing they hear communicated among the lords, under pain of deprivation and infamy: which can take place now, only as to some particular causes advised with close doors, as all causes formerly were ^e. They incur the same penalty, if they extort more than their ordinary fees. The lords frequently advocate brieves, for serving heirs, from the inferior judges to their own macers; and, in case of intricacy, appoint two of their own number assessors to them.

16. Macers before the court of session, justiciary, exchequer and admiralty; their office, and punishment, upon malversing.

^e P. 1537. c. 62. 63.

OFFICERS before inferior courts, as well as macers and messengers, did formerly execute summonses before the court of session, and letters in the king's name ^f, to relieve the judges themselves of the trouble, on whom it was incumbent to perform that service, as above; but that was afterwards limited to messengers at arms, who do

17. Officers before inferior courts, their duty and business.

^f P. 1540. c. 74.

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do not concern themselves in executions before inferior courts. Those courts have their several officers appointed by themselves for executing their own precepts, whether for citation, or charge to make payment, precepts of ejection, poinding or arrestment. All these may be executed by the officers within the jurisdictions of the respective judges, granters of the precepts, but not elsewhere; but hornings, or other letters and diligences on their decrees, in the king's name, under the signet, must be executed by messengers or officers at arms.

18. Constables; the penalty when they refuse to concur with an officer of the revenue.

CONSTABLES are the officers before the justices of peace, who execute their orders, warrants and decrees. Their office and duty are fully contained in the statutes^a, for that purpose, to which I refer. I shall only observe, that if constables required by any officer of the revenue, to go along and be present at the doing any act, to which the presence of a constable is necessary, refuse or neglect to comply, they are liable to 20 l. of penalty^b; and for other malversations they are punishable by the justices.

^a P. 1661.
c. 38.
6 Annæ, c. 5.

^b 11 Geo. I.
c. 29.

19. The duty of officers before inferior courts. This laid down in the books of the majesty.

WHAT is already said concerning the executions of messengers, may serve as to the officers before inferior courts, for the same solemnities are required in both; tho', by the custom of baron-courts, verbal citations, verified in court by the officer, are sustained, as was the case of old of all briefs and summonses; but the witnesses behaved likewise, by express statute, to swear in court to the verity of them^c. It refers to the six terms of summonses, as contained in the law. These are distinctly set down in the book of the majesty^d, and nowhere else, and are still necessary, viz. 1. The name of the defender. 2. The name of the pursuer. 3. The debateable matter concerning which the summons is made. 4. The day of comparance. 5. The place where the defender should appear. 6. The judge before whom he is to appear. I must observe, by the way, that this reference to those books, as our law, demonstrates the authenticity of them. It is still requisite, in executions of briefs, for serving of heirs, that the executer and witnesses verify the same upon oath, but not in other executions. Nor do the witnesses to citations before baron-courts verify them; and generally no witnesses are taken thereto, but the whole depends on the veracity of the officer; which is an abuse, and ought to be corrected.

^c P. 1429.
c. 112.
^d Reg. maj.
lib. 1. c. 6.
§ 8, &c.

T I T. VII.

The Jurisdiction and Authority of the Court of Session.

1. The institution of the court of session; it consists of 14 ordinary lords and the president; and formerly four extraordinary lords, if the king pleased to name them.

THE jurisdiction of particular courts of judicature comes next to be considered. Among which the court of session, or college of justice, instituted by king James V. anno 1537, after the model of the parliament of Paris, justly merits the first place. It consists of the president, and 14 ordinary lords of session. The chancellor, when present, had the privilege to preside, in which case the lord president sat as an ordinary lord: and, in absence of the chancellor and president, the lords choose one of their own number to preside for the time^a. Nine lords make a quorum, tho', by the institution, 10 were requisite^b. The king, by the original erection, might name

^a P. 1579.
c. 93.
^b P. 1537.
c. 57.
P. 1587.
c. 44.

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^a P. 1537.
c. 40.

name three or four lords of parliament to sit and vote in the court of session^a. who are termed Extraordinary Lords of Session. But those are not counted in making a Quorum, nor do they receive a salary, and are not bound to attend, but when present they vote, and their votes are of the same effect as those of the ordinary lords.

^b 10 Geo. I..
c. 18.

^c P. 1579.
c. 93.

By a late statute, whenever the places of the four extraordinary lords of session, that then were, should become void, no new presentation or nomination of any extraordinary lord can be made to supply the vacancies; and, if any such nomination shall be made, it is declared null and void^b: and at present there are but two remaining. This is no innovation or encroachment on the court of session, but only the king's departing from his own prerogative to name extraordinary lords, which he had by the original institution. They were not subjected to any examination, or form of admission, by the court of session, as is necessary in the case of the ordinary lords^c; and since the extraordinary lords do not make up the number to constitute a quorum, the constitution of the court is not violated by discontinuing them in time coming. At the same time, it must be owned, that it conduced not a little to the benefit of the subjects, to have four of the nobility thus trained up in the experimental knowledge of our law; and who, by the original plan, being peers, were of course members of parliament, and so judges in the last resort.

2. No new extraordinary lords of session to be named; this no encroachment on the session.

^d 10 Geo. I.

^e July 31.
1674.

By the same statute^d the admission of the ordinary lords of session is thus ordered, *viz.* That the king shall name and present any person to the vacancy, qualified in terms of former acts, and particularly the articles of union, whereby the person presented must have served five years as advocate or clerk of session, or 10 years as writer to the signet. And writers to the signet must likewise have undergone a trial on the civil law, before the faculty of advocates, two years before their presentation. The qualifications of the presentee are to be tried by the court of session, which is done in this manner; He reports two or three points to the lords, taken to report by the lord ordinary in the outer-house; and, in order thereto, sits on the bench with him, while he is hearing the causes pleaded before him; and thereafter, he must report a cause, upon an hearing in presence, in the inner-house. And, on all these occasions, he gives his opinion upon the points reported, before the court proceed to judge in the same. If the lords are satisfied with his performances, they admit him to the office, upon taking the oaths to the government, and the oath *de fidei*, or for the faithful administration of his office. This order of trial is prescribed in an act of federunt, approved by the king, and which has been ever since observed^e. But, if the lords are of opinion, that the person named is not duly qualified, they, by the foresaid new regulation, shall transmit the whole matter to the king; and, if his majesty shall signify, under his sign-manual, that the person nominated shall notwithstanding be received, the lords are forthwith to admit and receive him accordingly: and if the king, after such examination, shall nominate some other person, the same order is to be observed as with the person first presented. The lords of session hold their office for life, or *Quamdiu se bene gesserint*.

3. The manner of the presentation and admission of the ordinary lords of session.

4. The court of session or college of justice more particularly described. The business of the ordinary in the outer-house.

THE court of session, or senators of the college of justice, (as the lords of session are frequently termed) sit in the inner parliament-house, and causes decided by them are said to be determined *In præsentia, i. e.* in presence of the lords of session. The 14 ordinary lords come by turns weekly to the outer-house, and each, in his week, hears causes that come before the lords, in the order the same are set down in the books of enrollment, by the keeper thereof. The lord, whose course it is to sit on the bench in the outer-house, is called Ordinary for that week, and hears causes argued before him, while the rest of the lords are sitting in the inner-house, for discussion of business before them; and, upon extraordinary occasions, is sometimes called in to be assistant. Such causes as are fixed before ordinaries, by being called before them during their week, but not determined, are farther heard by them at the outer-house bar, when the inner-house is not sitting, till they are finally discussed; and for that purpose three lords sit in the outer-house, from nine to ten, each federunt-day, on three several benches there^a.

^a Act of sed.
June 6. 1733.

5. The constitution of the inner-house of session, and their cognizance.

THE lord president, and all the ordinary lords, except the one who, by course, is ordinary in the outer-house, meet in the inner-house for the determination of causes brought before them, at 10 in the forenoon, on all the work-days of the week, (except Monday) during the time of session, which, for the winter, begins the first of November, and ends the last of February, with an intermission not exceeding 10 days in time of Christmas; and begins on the first of June, and ends the last of July for the summer-session. As to which, there is no alteration by the late act, for correcting the Calender by an express proviso in the statute^b. So that, when the new Calender takes place, *viz.* after the 2d day of September 1752, the court of session shall meet, and rise 11 days later than the same would have happened by the new supputation of time, by which the commencement of each month is anticipated or brought forward, by the space of 11 days; and the same is the case as to the court of exchequer. Tho', by the institution, Monday is a federunt-day^c, yet it was afterwards found convenient, that it should be left vacant, in order to the clients advising the lawiers in their causes, that were to come in, by course of the roll, before that week's ordinary. The cognizance of the lords in presence concerns actions, wherein the proof is concluded upon acts of litiscontestation, determining the relevancy, or before answer, conform to the order of the rolls; as likewise other causes, which, on account of the importance of them, or their requiring dispatch by the forms, or by special appointment of the court, are to be heard and determined in presence; or are brought before them upon report from the ordinaries in the outer-house, where they find difficulty, or by petitions from parties, who think themselves aggrieved by the interlocutors of the ordinaries. The lords, of old, advised and determined causes with close doors, but which was remedied by statute^d; it being reasonable, that parties and their procurators should be present, to suggest such matters of fact as might otherwise escape the observation of the court; and that the grounds whereon their judgments proceed should be known to the world.

^b 24 Geo. II.
c. 33.

^c P. 1537.
c. 43.

^d P. 1693.
c. 26.

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IF a decree is extracted, upon judgments by the ordinary, without laying the case before the whole lords, it is as effectual, as if it had been pronounced by them. This is most reasonable, because all that are not satisfied with the ordinary's interlocutor, may reclaim to the whole lords, and therefore such as do not, are understood to acquiesce; and the same must conclude them as effectually as judgments of the collective court. And accordingly the stile of such decrees is the same, as if they had been given by the whole lords.

6. Decrees, or judgments before an ordinary, as effectual as those by the whole lords, after decree extracted.

THEREFORE this court is justly admired for its contrivance, in order to dispatch of business, and, at the same time, with great solemnity and deliberation. It is in effect 14 superior co-ordinate courts all in one; because the sentence of each of the ordinaries is after extract equal to that of the whole. And the whole lords, *in praesentia*, may be regarded as a court of appeal, where the judgments of the respective ordinaries may be summarily before extract reviewed, and, if wrong, reversed. The ordinary, whose interlocutor is under review, sits and votes in the question, Whether it shall be affirmed or reversed; since, in either case, he can only have in his eye the impartial administration of justice between the parties; and, upon the reasoning of the other lords, may be of opinion for altering his own interlocutors, as sometimes hath occurred.

7. The court of session, in effect 14 courts, and a court of appeal.

AND, for the further expediting of business, two of the lords, by turns, attend in the session-time in the afternoons, when the court of the inner-house does not sit, each of whom takes the depositions of parties or witnesses that are brought before them; and both concur in taking the evidence, in some few cases, of great moment, as in improbations, and proving the tenors of writings. And another ordinary has, by course, the charge of preparing and making up the states in concluded causes, in order to their being advised and finally determined by the court in presence.

8. Two ordinaries upon the witnesses, and one for preparing concluded causes.

IN order to dispatch matters that cannot admit of delay, one of the lords, in course, is ordinary upon the bills, and attends all session-days in session-time, before the lords sit down; and, in vacation-time, certain days of the week for signing deliverances (interlocutors) on common bills of horning, inhibitions, arrestments, &c. that pass of course; unless the party, against whom they are to be served, being apprised of them, object, and desire to be heard against their passing, and sometimes on special considerations they are stopt. But the chief business of this ordinary is the advising bills of advocacy or suspension; for, in passing those bills, a summary cognition is always necessary, that the dispensation of justice may not be protracted, nor the diligence of parties delayed without cause; and, if difficulty occurs in advising such bills, they are laid before the lords in presence, by the ordinary, or by the party who conceives himself aggrieved by the ordinary's judgment in time of session, and before three of the lords in time of vacation.

9. The business of the lord ordinary on the bills.

^a P. 1637.
c. 1. et seqq.

THE original institution of the court of session was by statute of parliament ^a. And the constitution of it was thereafter confirmed by the pope, who gave certain benefices in Scotland, and rents for

10. The court of session established by act of parliament; and

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confirmed by the pope. Why called lords of council and session; their constitution and privileges ratified by several Scots statutes, and secured by an article of the union.

for the sustenance of the senators of it, as the statute, in which this confirmation by the pope is mentioned, sets forth; but the same was afterwards put under a different regulation^a. They are designed the Lords of council and session in all their acts and decrees, as coming in place of the court of the lords of session of old, which was a committee of parliament, appointed from time to time to decide finally in causes civil^b, and consisted sometimes of more than 100 persons^c; and in place of the daily council that succeeded them^d. The jurisdiction, authority, and privileges of this honourable court were ratified in several subsequent parliaments. And last of all it is declared by the articles of union^e, That this court, its authority and privileges, shall remain the same in all time coming; but subject to regulations by the parliament of Great Britain, for the better administration of justice.

^a P. 1540.
c. 93.

^b P. 1471.
c. 61.
^c Spotsw. abstract from
ancient records, p. 360.
^d P. 1503.
c. 58.
^e Art. 19.

11. The privileges of the members of the college of justice; first to be exempted from the jurisdiction of inferior judges in civil cases.

THE privileges of the members of the college of justice are, First, That they may plead an exemption from the jurisdiction of all inferior judges, when pursued in civil causes; notwithstanding that such actions, in the case of others, must be sued before inferior judges in the first instance, as molestations^f, sums below 200 merks, (and by the late act 12 l. Sterling g) &c. And as they can only be insisted against before the court of session, so they may bring such causes at their own suit before that court: the reason is, because, being obliged to attend, they ought not to be abstracted from the business of their clients, by processes before other courts. And the magistrates of Edinburgh are bound to sustain a declinature of their jurisdiction in those cases, without obliging the party to raise an advocacy, which is the method with respect to others.

^f P. 1587.
c. 72.
^g 20 Geo. II.

12. How far does such exemption obtain in criminal matters.

As to the exemption of the members of the college of justice, from the jurisdiction of the magistrates in criminal matters, the lords of session superceded to give judgment when the case was before them^h, till enquiry was made into the custom. There does not appear any farther procedure as to that point. However it is plain, that as to misbehaviour of any particular members in their respective offices, it regularly can only be cognosed by the courts before whom they offend. And as to common misdemeanours, or crimes that do not concern the administration of justice, it would seem, that if there is no instances to the contrary, (as I know none) an exemption, in such cases, from the ordinary jurisdiction of inferior courts, ought not to take place; for the interest of the public requires that the trial of crimes should have its due course, without any let or impediment from privileges, *Ne crimina maneat impunita*, That crimes may not escape punishment; and the court of session is not competent in such cases.

^h Feb. 23.
1687.

13. They are free of the annuity and petty customs of the town of Edinburgh; their privilege when living in any other royal borow.

NEXT, they are free of the city of Edinburgh's annuity, imposed on the other inhabitants for payment of the stipends to their ministers, &c. and of all the city-imposts, and petty customs for victuals or liquors imported into the city for their use. Those privileges were ascertained by a sentence of the court of session, ingrossed among the acts of federunt, proceeding on a process of declarator, at the instance of certain members of the college of justice; by which likewise they declare who are the persons intitled to the sameⁱ. Members of the college of justice, being in any royal borow; are exempted,

ⁱ Feb. 23.
1687, acts of
fed. p. 154,
&c.

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ed, by special statute, from watching and warding, or contributing to assessments for the poor, or other burthens concerning the borow^a.

^a P. 1597.
c. 279.

^b P. 1537.
e. 68.
P. 1670. c. 8,
&c.

^c P. 1661.
c. 23.

^d Act of con-
vention of e-
states 1665.

^e Nov. 19.
1684. record-
ed in the
books of se-
derunt,
p. 137.

^f Artic. 19.

^g P. 1537.
c. 39.

^h P. 1424.
c. 65.
P. 1457.
c. 62.

ⁱ Conven.
of estates,
P. 1689.
c. 13.

BUT the lords of session were specially privileged from payment of all taxes, contributions, or other extraordinary charges imposed on the other subjects. This immunity was originally, at the institution of the college of justice, granted, and renewed thereafter to them by divers old statutes since^b, in which the reason of the privilege is justly assigned: "Their constant attendance on the session, except " in feriat or vacation time, and the great pains and trouble they un- " dergo thereby, and their eminent services to the king and the " kingdom in that respect." But this privilege, as to an exemption from the land-tax or cess, hath not taken place ever since the union; nor I believe for a long time before, the same being imposed on all lands without distinction, as to whom they belong. And indeed tho' it was at first peculiar to the lords, yet afterwards all the privileges, liberties and immunities that were competent to the ordinary lords of session, were, by express statute, extended to advocates, clerks, writers to the signet, and remanent members of the college of justice^c, which must include this privilege of exemption from taxes. And accordingly, in the first taxation imposed thereafter, which was by act of the convention of estates, it is declared, That the lands, belonging in property to the lords of session, and all other members of the college of justice, shall be free from the said taxation^d; and it is thought, that unless the exemption had been competent by law, the convention of estates could not have given such an indulgence. I find that the same was confirmed to the lords of session by a letter from king Charles II.^e but I doubt if it was ever since indulged them. The lords of session, however, have this peculiar privilege, that all complaints against them, called *Murmurings* in our statute, can only be laid before the king, who is to order the punishment of those found guilty; and if they are found innocent, the person complaining is to be punished with all rigour. All those privileges, either common to all the members of the college of justice, or peculiar to the lords, are secured by the treaty of union^f, as above.

THIS court has jurisdiction in all actions civil, and their sentences and decrees are declared, by the original institution^g, to have the same force and effect as the decrees of the lords of session had in times by-past. Now the lords of session, to whom reference is made in this act, were, in antient times, a committee of parliament, and were vested with authority to judge Finally, and without any remedy, by appeal to the king or parliament from their sentences^h. And, by our claim of right, it is only declared to be the privilege of the subjects to Protest for remeid or remedy of law to the king and parliament, against the sentences of the court of session, provided the same did not stop execution of those sentencesⁱ. Before which period neither appeals, nor protestations for remedy of law, were thought to be competent against the judgments of the court of session. And for insisting upon it, as the privilege of the subjects, to have relief from the parliament against the decrees of the court of session, whereby parties thought themselves aggrieved, the most eminent lawiers of the last age were debarred, by the lords of session, from the exercise of their

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office,

14. The peculiar privilege of the lords of session of old, as to taxes, communicated thereafter to all the members of the college of justice, discontinued. The privilege of the lords as to complaints against them. All the privileges of the college of justice, reserved by the union.

15. The court of session has jurisdiction in all civil causes. How far their decrees of old final; at present, appeal competent against their judgments; the effect of serving the writ.

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office; and which procedure was approved by the king; and the out-
ed advocates were not readmitted till they made submission to the
lords, and obtained the king's consent to that purpose. The whole
proceedings upon that occasion are recorded among the acts of fede-
runt^a. But, since the union, there lies an appeal to the house of
peers of the parliament of Great Britain, from the judgments of the
court of session, whether interlocutory or definitive; and serving the
writ of appeal stops execution, till the appeal is discuss'd or deserted, as
is before observed^b.

^a Jan. 25.
1676.

^b Sup. tit. I.

16. They are
to proceed
without re-
gard to any
commands
from the
king: all ac-
tions civil
may be
brought be-
fore them,
except causes
within 12 l.
Sterling in
the first in-
stance; unless
they concern
members of
the college
of justice.

THE lords of session are to proceed in administration of justice,
without regard to writings, charges or commands from the king and
his council to the contrary^c. As to the extent of the jurisdiction of
the court of session, all causes civil, that are not peculiar to other
courts, are competent before them, even in the first instance; but,
as above hinted, small causes, *i. e.* those within 12 l. Sterling, by
the late act^d, ought not to be brought before them, either original-
ly, or by advocacy, that they may have time to discuss the more im-
portant^e; but if the defender do not object, or if such causes belong
to any of the members of the college of justice, they may be pursued
before the court of session. The members of the college of justice
are the lords ordinary and extraordinary of the court of session, advo-
cates, clerks, writers to the signet, and the principal servants of all
the foresaid members^f.

^c P. 1579.
c. 92.

^d 20 Geo. II.

^e P. 1672.
c. 16.

^f P. 1594.
c. 220.

17. Questions
concerning
the validity
of infest-
ments of his
majesty's
property, or
arising from
decrees of
the commis-
sion, compe-
tent before
them.

ACTIONS, touching the validity or invalidity of infestments of his
majesty's property, or any other infestments^g, are peculiar to the ju-
risdiction of the court of session; as also those concerning the point
of right, in questions between the king and the subjects, are reserv-
ed to this court, in the statute establishing the court of exchequer^h.
Questions likewise arising from decrees of modification or locality,
valuation or sale of tithes, are cognoscible by the court of session, As
such; tho' the pronouncing these decrees and actions in order there-
to, or reduction of the same, are peculiar to them, As the court of
commission for plantation of churches and valuation of tithes.

^g P. 1661.
c. 59.

^h 6 Annæ,
c. 25.

18. The ju-
risdiction of
the court of
session, as to
advocating
causes from
other courts.

THE court of session may advocate civil causes from all inferior
courts, except the high court of admiralty in maritim cases; but
they may from the commissars, even in consistorial causes, tho' they
cannot judge them, but remit the same, with instructions or with-
out, as they find just, upon advising the bills of advocacy, or at
discussing of the same. As to criminal causes, they may unquesti-
onably advocate from inferior courts, such as infer pecuniary fines or
penalties, and finally judge therein, if they see ground for remov-
ing the same from such courts. They do not advocate causes from
the court of justiciary, in order to give instructions, since the regula-
tion of it by the act 1672; tho' we are informed that they were for-
merly in use to do itⁱ. I shall speak more at large of advocations
afterwards.

ⁱ Stair lib. 4.
tit. I. § 35.
Mackenzie,
crimin. part
2. tit. 8.
§ 5, 6.

19. The court
of session a
court of re-
view, as to

THIS superior court has an eminent jurisdiction, as a court of Re-
view of sentences of inferior courts in civil causes; and in that, and
other respects, is vested with the like powers as the court of Chancery
in

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in England ; and, by the treaty of union, the same is secured to them, independent of that court. They may suspend or reduce the decrees of all inferior courts in civil cases, those of the high court of admiralty, and commissars of Edinburgh, not excepted. And they may without doubt suspend or reduce sentences of inferior courts in criminal causes, that had not proceeded on the verdict of an inquest.

proceedings
and decrees
of inferior
courts in ci-
vil cases, and
likewise in
some crimi-
nal causes.

It is the opinion of some eminent lawiers of the present age, That the court of session properly have the sole power of advocating all criminal causes from inferior courts, and to remit the same to the justiciary, if they concern cases capital, or such others as are to be tried by a jury, if they see grounds for removing such causes from the inferior courts ; and that, likewise, it is the province of the court of session to pass bills of suspension of all sentences of inferior courts in criminal matters, and to remit the same to the court of justiciary to be judged, when they are of the above importance. That this was the case before the regulations 1672, we are assured by two eminent lawiers of the last age^a, as above ; and there seems no ground for a variation by those regulations. I shall only, with great submission, offer one argument in support of that opinion, *viz.* That, by the act which establishes the jurisdiction of the admiral court, which was subsequent to the regulations 1672^b, the lord high admiral is declared to have a Supreme jurisdiction in all causes maritim, civil or criminal ; and it is ordained, That there be no advocacy of such from the high court of admiralty, and that any bill of suspension of their decrees, in such cases, shall be pass by the whole lords in time of session, and by three lords in time of vacation. This last ordinance makes no distinction between civil and criminal causes ; and therefore, it may seem to be a natural inference, that the court of session had the sole power of passing such bills of suspension, and remitting the same to the justiciary, when proceeding on a trial by an inquest ; for we can hardly imagine, that the admiral court is more supreme in criminal matters than civil ; or that in such their sentences are liable to no review ; of which I shall have occasion to speak more at large afterwards, when I treat of that court. And, if such be the case as to the high court of admiralty, that of inferior criminal courts cannot be different in this respect. It is very true, the court of justiciary have been in use of passing bills of advocacy of criminal causes from inferior courts, and of suspending their sentences ; but that is said only to have taken place since the revolution, and not to have been in use before. And the reason may have been, that the lords or commissioners of justiciary are, and, by their constitution, must be lords of session, and therefore there was no question made as to the interfering of jurisdictions. And now usage seems to have established the power of the justiciary in that respect.

20. How far
the court of
session may
advocate or
suspend, in
the case of
proceedings
before infe-
rior courts,
by way of
inquest.

^a Stair, b. 4.
tit. 1. § 35.
Mackenzie
crim. part 2.
tit. 8. § 5. 6.

^b P. 1681.
c. 16.

THOSE advocations, suspensions and reductions, are in place of Appeals, formerly in use with us, and still used in other countries, and are much more convenient for the due administration of justice, than appeals ; because processes are not retarded, or execution staid, without just reasons seen and considered by the lords. These appeals from inferior courts to the lords of session, antiently with us, were called Falsing of Dooms, the order of which is fully set down in the sta-

21. Advocations, suspensions and reductions in place of appeals, are more convenient.

tutes

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tutes touching the same^a. But appeals in civil causes, not exceeding the value of 12 *l.* Sterling, from inferior judges to the circuit-courts, are introduced by the late statute^b, of which I have taken notice at large in another place^c; and shall hereafter of suspensions and advocations.

^aP. 1429.
c. 116.
P. 1503.
c. 95.
^b20 Geo. II.
^cB.3. tit. last.

22. In what cases may the lords review, by suspension or reduction, their own decrees.

It is the privilege of the lords of session, as a superior court, that they can suspend or reduce their own decrees, as, when they are in absence; and even tho' they are upon comparance, and *in foro*, yet if new matters of fact have emerged, or come to knowledge since the decree; or if the defenders were minors, and allegations in fact or law were omitted, they may still be received in a suspension or reduction. But where the allegations have been Proponed and Repelled, the lords cannot, after decree is regularly extracted, review the same, even tho' the party was minor; because they have given their final judgment, and so are *functi*; and it is necessary, for the security of mens rights, that an end be effectually put to the suit, which, if such decrees were subject to review, might be perpetual. Therefore, tho' what was Competent and Omitted in the decree may, in the special cases above related, be received in a suspension or reduction thereof; yet what was Proponed and Repelled cannot be afterwards so admitted, and which is established by express statute^d. But, if the decree was wrongfully extracted, it may be summarily recalled, upon petition to the court, and the case re-heard.

^dP. 1672.
c. 16. art. 19.

23. The lords of session both a court of law and of equity.

THE COURT of session is both a court of Law and Equity in one. Thus, where the party wants relief in equity, to which at common law he might seem not intitled, this court, in virtue of this mixed jurisdiction can give it: as for example, one grants a bond of borrowed money, with a condition to repay it at a precise day, under a penal sum, besides performance, as the expences liquidated by consent of parties; upon failure of payment at the day limited, the penalty in strict law is forfeited to the creditor; but, if the creditor insist on it, and will not be satisfied with his principal sum, interest and expences, the court of session will give relief to the debtor. Among the Romans, the courts of ordinary jurisdiction behoved to follow the letter of the law, but the Prætor supplied what was defective in it. Hence the distinction frequent in that law between the *actiones directæ*, founded directly in the law, and *utiles* or *actiones in factum*, given by the Prætor in point of equity, from the spirit and intendment of the law, on which occasion it is said, that *Supplet prætor in eo quod legi deest*^e. After which example, the courts in Westminster-hall (except the equity-side of the court of exchequer) are limited to the express deeds of the parties, and can give no relief in equity. Thus, in a similar case with the foregoing one, in the English double bonds, the courts of common law, upon failure of payment of the sum in the condition, at the day, behoved to decree for the whole double sum, but relief was competent upon a bill in chancery; and now, in virtue of the late statute, the courts of common law can give the remedy, and absolve the defendant, upon his bringing into court the principal sum, interest and costs^f. There are infinite other cases, where the court of session give relief in equity, when, in strict law, there seems to be none; as in redemption of wadsets limited to a precise

^eL. 11. ff. de præscrip. verbis.

^f4 and 5 Annæ, c. 16.

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cise term, after which the lands are declared irredeemable: this court allows the equity of redemption, notwithstanding the irritancy incurred, &c.

BESIDES the *officium ordinarium*, or ordinary jurisdiction which the lords of session are vested with, there is competent to them what may be termed *Officium nobile*. This *nobile officium* is founded in their being a superior court, and as such, they are intitled, in some cases, to interpose, otherwise than according to the ordinary rules or forms of law, and even contrary to the form of ordinary proceedings, when the case requires it, in order to bring out the truth, which could not otherwise be done; or to interpose in points necessary for the public good of the society; or for making justice effectual in private cases, where the ordinary forms cannot reach the end, as where the court orders either, or both parties to be examined, *Ex nobili officio*, without the one party's referring the point to the other's oath, or where, *ex officio*, they ordain witnesses to be examined *ad rimandam veritatem*. This is a supereminent power, founded in their high jurisdiction, in order to the discovery of truth, and cannot be said only to proceed upon their equitable powers. Equity is a favourable construction of the law, and may be prayed by either party; but no party is intitled to demand, as his right, an examination *ex officio*; he may suggest it, but he cannot ask it as a point of right. Of the like kind is the lords interposing to give warrants for administration of the estates of infants, having no person to take care of them, or of persons abroad. They likewise, by this power, supply the defects of ordinary forms of diligence, as they did by allowing adjudications *Contra hæreditatem jacentem*, when the apparent heir renounces; for in that case the law had not provided a remedy. The same was the case of adjudications in implement, introduced by authority of the court of session, to complete a party's right to lands. To this power may be ascribed the lords authorising persons to supply the vacancy of commissariots for confirming testaments; or of sheriffships for expediting services; or such matters as cannot admit of delay, till the places be regularly filled^a: as likewise, their ascertaining the *quantum* of burthens imposed by deeds of parties, where those authorised to do it have failed; as where the members of a tailie were allowed to grant such constant jointures and provisions to their wives and younger children, as certain friends named should appoint, who died without doing it^b.

^a July 31.
1746. city of
Edinburgh.

^b Fount. July
15. 1692.
Hepburn.

24. The *officium nobile* competent to the court of session in extraordinary cases; instances of this.

A MEMORABLE instance of the exercise of this *nobile officium*, for which the court had the thanks of the government, was, after the malt-tax was intended to be made effectual in this country, which created great disquiet, and a kind of mutiny. The brewers in Edinburgh entered into a resolution to give up trade, as what they thought could not be further beneficial to them; as this resolution was entered into by all of them in one day, the inhabitants might apparently have been reduced to the greatest straits for want of drink: wherefore the court of session interposed, made an act of sederunt, and order upon the brewers, that they should find caution to continue their brewing for the use of the burgh, as formerly, under the

25. A remarkable instance of the *nobile officium* of the court of session.

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pain of immediate imprisonment, until they should comply; and which accordingly was put in execution, and had the desired effect.

26. This *nobile officium* is implied in the power to make acts for expedition of justice, and is after the example of the court of equity in the chancery of England.

THIS *nobile officium* is plainly implied in the statute, which gives the lords of session power to make acts and ordinances for expedition of justice^a: for, in order to the same end, they may exercise the above, and other acts of jurisdiction having tendency to the like purpose. This is accomplished by the *nobile officium* of the court of session, in the same manner as things of the like kind are done by the court of chancery in England, which with us is supplied by that eminent power, and without which the administration of justice would be embarrassed, and, on many occasions, could not proceed. And, by the original institution, they had the same jurisdiction and authority that the lords of session of old had^b; and except as to the liberty of appealing against their judgments, in manner above-mentioned, their authority is still the same, being settled by the articles of the union.

^a P. 1540.
c. 93.

^b P. 1537.
c. 39.

27. The court of session in place of the court of chancery with us. The chancellor might have presided in it.

THE chancellor of Scotland had the privilege to preside in all judicatories of the kingdom^c; and particularly, at the institution of the college of justice, he might preside, when present, in the court of session, as above, (tho' another was the ordinary president of it^d) in the same manner as he did in the old court of the lords of session, which were a committee of parliament^e. But the chancellor never had by himself any judicative power in causes between parties with us. Wherefore, since we had no court of chancery, it was justly ordered, that our superior court of justice, in civil matters, should be endowed with the high jurisdiction aforesaid. This *nobile officium* of a court is founded in an express text of the civil law^f.

^c P. 1661. c. 1.

^d P. 1537.
c. 40.

^e P. 1425.
c. 65.

^f L. 13. ff. de legibus.

28. By this power the lords cannot extend statutes beyond their terms, under colour of equity.

IN virtue of this *nobile officium*, or of their jurisdiction as a court of equity, the lords of session do not assume a power unsuitable to the character of judges, which is to interpret the laws by the rules of equity, where there is place for it. Thus the laws of the Romans were to be interpreted by the judges according to equity, and from thence to be extended to similar cases^g; but, if there was a contrariety between the words of the law and equity, it was the prerogative of the emperor to give the interpretation, *Inter æquitatem jusque interpositam interpretationem nobis solis*, (says the great Emperor Constantine) *et oportet et licet inspicere*^h: and which the Emperor Justinian farther explainsⁱ.

^g L. 31. ff. de legal. l. 5.
c. eod. tit.

^h L. 1. c. de legib.
ⁱ L. fin. eod. tit.

29. How far the jurisdiction of the court of session extends to matters criminal.

THE jurisdiction of the lords of session is properly in causes civil. But besides what is already observed, touching advocations and suspensions in criminal matters, they judge in some other criminal cases, but principally for a civil effect; as in battery, *pendente lite*, that the invader may be declared to have lost the cause, and in improbation of writings, for declaring them forged or improbate; and sometimes they punish the forgers, *viz.* when circumstances of mitigation attend them, and they deserve not a severe corporal punishment, as death or demembration. But otherwise they remit them to the court of justiciary, who always, in such case, inflict a corporal, and generally a capital punishment. The lords likewise impose censures, or other arbitrary punishment on such as commit offences

or

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^a Acts of sed.
p. 32. Jan.
30. 1650.
sentence a-
gainst Black-
ader, p. 275.
July 20.
1751. king's
advocate a-
gainst Wells.
^b B. I. tit. 10.

or misdemeanours in relation to causes depending before them, as falsehood or corruption in witnesses, practising upon them, or suppressing of evidence ^a; or concerning the court, or any of their number, or other members of the college of justice, in the exercise of their office; or persons in the prosecution of their causes before them, as was formerly remarked. The lords are also fully competent to actions of wrongous imprisonment, or for damages arising from crimes, as is set forth elsewhere ^b.

REGULARLY, causes, intended to be discussed in the court of session, are brought in before the ordinaries. But there are some cases where-in summary complaints are directly competent to the court, without applying to the ordinary in the outer house; as against irregular extracts, or for the abuses just mentioned, or for contempt of the lords authority, by parties disregarding suspensions, or inferior judges proceeding in the cause after advocacy, and in other extraordinary cases that stand in need of present remedy. Summary application is likewise frequently allowed by statutes; as complaints for undue returns of commissioners to parliament, or for annulling elections of magistrates or town-counsellors; and this course is sometimes followed in complaints against forgers of writings, &c. And in those cases the complaint or petition is served on the parties, by order of the lords, upon certain days notice, and the cause thereafter is either heard in presence, or discussed, on advising the bill and answers, as the importance of the same requires.

30. Summary complaints for contempt of authority, or undue election of magistrates, must also be presented to, and advised by the lords in presence.

THE lord president resumes all cases before the lords, whether upon pleadings in presence, reports or petitions, and superintends the proceedings of the court, which is a vast province, and requires a man of great abilities to discharge it. He who fills the chair is every way worthy of it, and fully equal to the charge; and all that wish well to this country, and the speedy and equal administration of justice, will rejoice at his long continuance in that eminent station.

31. The lord president resumes all cases before the court of session; this a vast province, but he who fills the chair every way equal to it.

Observations on the Law of England, in relation to the Premises.

IN the chancery of England there are two courts, one Ordinary, *Coram domino rege in cancellaria*; where the lord chancellor, or lord keeper of the great seal, proceeds *Secundum legem, et consuetudinem Angliæ*, according to the line of the laws and statutes of the realm: thus, he holds the plea of *Scire facias*, for repeal of the king's letters patent, traverses of offices, writs of *Audita querela*, &c. and another Extraordinary, *Secundum bonum et æquum*.

1. In the chancery of England there are two courts, one of common law, and another of equity.

THIS last court is called a Court of Equity, or Court of Conscience; and three things are chiefly to be judged in it. 1. Covin, *viz.* all frauds, covins and deceits, for which there is no remedy at common law. 2. Accident, as where a party is prevented, by an intervening accident, from fulfilling a condition; for instance, a servant of an obligor or mortgagor is sent to pay money at the day, and is robbed, or the like. 3. Breaches of trust and confidences ^a.

2. The court of equity judges 1. of Covin or fraud. 2. Accidents 3. Breaches of trust or confidence.

^a Coke 4. inst. 82, &c.

BUT

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3. The court of equity gives no relief where the party's right is cut off by act of parliament.

BUT in no case will this court of equity give relief to a party whose right is cut off by an act of parliament; as where one has lost his action by the statute of limitation; nor will it give relief directly against a rule or maxim of the common law. And where the party appears to have a plain and adequate remedy at common law, this court will not intermeddle in point of equity, but dismiss the bill, and leave the party to such remedy ^a.

^a Coke 4. inst. 8. Bac. new abr. (court of chancery) 590.

4. The court of session vested with the like powers as the court of equity, and subject to the same limitation in the exercise of it.

THE court of session is invested with the same powers as this court of equity in the chancery. And likewise in giving remedy in point of equity, or otherwise they are subject to the same limitations; for under that colour, or by virtue of their *nobile officium*, they cannot contravene the direct ordinance of the law, as to reponne a party against prescription, or the like.

T I T. VIII.

The Court of Commission for Plantation of Churches, and Valuation of Tithes.

1. The origin of the court of commission on a committee of parliament. The effect of their decrees of old and at present; at first they only had power to provide ministers out of the tithes; thereafter their powers much enlarged.

THE next court that naturally falls under our consideration is the Court of Commission for Plantation of Churches, and Valuation of Tithes. It was originally a commission of parliament, to a particular number of each estate, for a limited time, and renewed from time to time with almost the same powers, but with some variation as to the Quorum ^a. This court became necessary after the reformation, when tithes mostly came to be in the hands of laymen. Their acts and decrees were declared to have the same force as decrees or acts of parliament. In that state it would seem that this court had a higher jurisdiction than the court of session; but there lies at present an appeal from them to the house of lords, in the same manner as from the court of session, which is now vested with their authority. The first commission had only power to provide ministers with competent stipends, out of the tithes of the parishes, in the hands of titulars and tacksmen; and to grant tacksmen a recompence for the additional burthen of stipend, by prorogation or prolongation of their tacks or leases, as they saw reasonable ^b. But thereafter, pursuant to the regulations by king Charles I. in relation to tithes, their powers were considerably enlarged ^c.

^a P. 1617. c. 3. P. 1621. c. 6. P. 1633. c. 14, &c.

^b P. 1617. c. 3.

^c P. 1633. c. 19.

2. The jurisdiction of this court annexed to the lords of session, but still as a court of commission, and, as such, have different clerks and macers from those of the session; the writers to the signet not concerned in

THE jurisdiction that formerly belonged to the commission is now annexed to the cognizance of the lords of session, by special statute, which sets forth in the preamble *The great prejudice that did redound to this nation, thro' want of an established and fixed judicature, to cognosce and determine in such causes and things as by former parliaments were referred to their commission for Plantation of churches, &c.* and therefore authorises and appoints the lords of session to judge, cognosce, and determine in all affairs and causes whatsoever, which, by the laws of this kingdom, were referred, and did belong to the jurisdiction and cognizance of the commissions appointed for that effect, as fully and freely in all respects as they do, or may do, in other civil causes ^d; and most of the particulars that fall within their verge are specially mentioned in the act. Tho' the same persons are now judges in the court

^d P. 1707. c. 9.

TIT. VIII. Concerning Plantation of Churches, &c. 521

court of session and court of commission, yet they are still several courts, and the lords judge in a quite different capacity, As commissioners for plantation of churches, &c. from what they do As judges in the court of session. They are ordained to meet every Wednesday in the afternoon, in time of session, and to call and discuss causes, belonging to their cognisance as the court of commission, summarily, by course of the roll to be made up of the same; and, as the court of commission, they have their own clerks and macers different from those of the session, as formerly the commission had. The lord register and his deputies have the only power and privilege to raise and subscribe summonses and diligences relating to the affairs belonging to the commission; but they must pass his majesty's signet as formerly: however, the writers to the signet are not intitled to intermeddle therein, tho' they sign all summonses before the court of session. Summonses before this court have but one diet, which is on six days as to those within the kingdom, and 60 as to persons abroad, and their decrees may be extracted after the next sederunt-day, if no stop is procured thereto.

summonses
before them.

THE jurisdiction of this court extends to all actions for valuation and sale of tithes, modification and locality, or augmentation of ministers stipends, prorogation to tacksmen of tithes, on account of new burthens imposed on them during the currency of their tacks. They have farther the only power to disjoin too large parishes, to erect new churches, or to transport churches, as they see cause, the same being always done with consent of the heritors of three fourths of the parish, conform to the valuation of the same. They have likewise, by the same statute, power to unite two or more parishes into one; but as to which the foresaid consent of the heritors is not requisite; because they have no patrimonial interest, as to the tithes or otherwise, to oppose such annexation.

3. The extent
of the jurisdic-
tion of
this court;
the manner
of their pro-
ceedings; ap-
peal lies a-
gainst their
decrees.

THE rules by which they are to proceed in matters before them, are laid down in the before quoted act, establishing the lords of session in place of the commission, and acts therein referred to. All causes are determined in presence of the whole lords, except some special points, which they remit to any of their number, from whose interlocutors there is place to reclaim to the lords as a court of commission. They may review their own interlocutors, and reduce their decrees, or those of the old commissions. And whatever the prerogative of this court was, when they were in a manner a committee of parliament, there now lies an appeal from their sentences to the house of lords, as above.

THE powers exercised by this court may seem, in some respect, an encroachment on property; for instance, to value and sell tithes, without the owner's consent, for a price below the true value; and to grant prorogations of tacks of them, without consent of the titulars, who are proprietors of the same: all which may be supposed liable to objection as acts of injustice, and that the same ought not to be allowed. But it must be considered, that the titulars and tacksmen of the tithes had but a quarrelable title thereto; and therefore surrendered their right into the hands of king Charles I.^a and submitted to

4. The founda-
tion of the
powers of the
commission
to value and
sell tithes at
a price much
below the
true value,
and to pro-
rogate tacks,
without con-
sent of the

^a Anno
1627, 28,
29.

titulars of the
tithes.

his determination what consideration they should have for the same. And accordingly the king pronounced his several decrees-arbitral, allowing to the heritors a valuation and sale of the tithes of their own lands, and taxing the price to nine years purchase of the free tithes; and which were the foundation of the powers granted to the court of commission, by subsequent statutes, in relation to the valuation and sale of tithes^a. And this was extended afterwards to tithes, whereof the heritable right is given to the patron, under an obligation to sell them to the respective heritors, at six years purchase of the free tithes^b; but which respective valuations are to be made with deduction of the king's annuity. And as to prorogation or prolongation of tacks, it is a most natural recompence to tacksmen; and the titulars have themselves only to blame, since they have it in their power to prevent it, by undertaking the additional burthen imposed on the tithes during the currency of the tacks. I have treated on prorogation of tacks of tithes by the commission elsewhere^c.

^a Anno
1633.

^b P. 1690.
c. 22. and 30.

^c B. 2. tit. 8.
§ 173.

5. The lords of session, as a court of commission, have power to make up the tenor of decrees, whereof the warrants were burnt; their decrees have the same force as the decrees of the session.

THE lords of session, as a court of commission, have not only the powers competent to the former commissions of tithes transferred to them, but are farther impowered to make up the tenor of the decrees that had passed before them. And for supplying the register of that court, which was destroyed by fire in the year 1700, they were ordained to receive, into the register of that court, any extracts from those records, which are to be holden as the warrants, and the presenters of them to have new extracts *gratis*^d: and farther, by practice, hornings on decrees of locality, whereof the warrants were lost, as above, are holden in place of the decrees themselves. The proceedings and sentences of the lords of session, as a court of commission, are declared, by this act, to be of the same force as in other civil causes before them as a court of session; and for this reason are liable, in the same manner, to review by appeal to the house of lords.

^d D. P. 1707.
c. 9.

T I T. IX.

The Court of Justiciary.

1. The court of justiciary; they assess the damages to the party grieved.

THE Court of Justiciary has not properly any jurisdiction in civil cases: however, in criminal prosecutions, at the instance of the party aggrieved, with concurrence of the king's advocate, they, on divers occasions, decree the defender, found guilty of the crimes or offences wherewith he is charged, in damages to the pursuer, at their own modification.

2. The ancient jurisdiction of the high justiciar; he kept his stated court in Edinburgh; and likewise held justiciarairs.

ANCIENTLY with us, the whole supreme civil jurisdiction, as well as criminal, was lodged in the high Justiciar, or Justice-general appointed by the king, which is of very old standing^a; the fees of him and his clerks having been limited to them in those times, as established officers; and indeed in that old statute, just referred to, the justiciar is taken notice of next to the Chancellor. The justiciar kept his courts in Edinburgh, and, in cases of difficulty, assessors were appointed to him by the king, and he was to hold two Justice-Eyers, or Airs, yearly in each shire. And I find that sometimes there were two

^a Leg. Malc.
II. c. 3.

two justiciars, one on the south-side, and another on the north-side of Forth^a.

^a Stat. Rob.
III. c. 30.

BUT thereafter matters were reduced to the old standard; and even while the ancient court of the lords of session, which was a committee of parliament, subsisted, the justice or justiciar was a superior judge-ordinary for all civil causes, as he is expressly termed in the statute^b; by which it appears, that very few causes were then competent before the lords of the king's council, as the ancient lords of session were then termed, which appears from the records of their proceedings^c. But after the institution of the college of justice, the justiciar or justice-general ceased to have jurisdiction in civil causes, which was vested in the court of session then established^d. But the justice-general remained still judge-ordinary for criminal matters; and the justice-airs were thus ordered^e, *viz.* that the justice-general should appoint eight deputes, or that the king grant commission to so many, as justice-deputes, two of whom should be for every quarter of the realm. And there is likewise mention made of a deputy from the treasurer, and another from the justice-clerk, who it seems were to be assistant in those circuit-courts or airs, which are described at great length by our learned antiquary^f, to whom I refer the curious reader.

^b P. 1487.
c. 105.

^c Spotsw. abstract out of the ancient records, p. 361.
^d P. 1537.
c. 36.
^e P. 1587.
c. 84.

^f Skeen verbo (iter.)

3. The jurisdiction of the justiciar or justice-general, during the old court of the lords of session, and daily council; and after institution of the college of justice.

THIS method continued till the regulations 1672 were introduced, and the office of justice-deputes was thereby suppressed. And, in place of the jurisdiction competent to the justice-general, a new court was erected, whereof he was to be one member, and all the prerogative he had over his colleagues was to preside in the court, when present, and the justice-clerk is made next to him in dignity. By these regulations the court of justiciary is expressly restricted to criminal causes; and indeed, in the former regulations 1587, there is no mention of civil causes, as belonging to the cognizance of the justice-general, or his deputes, the same having been formerly vested in the court of session, as above.

4. The justice-court, or court of justiciary, as modelled by the act 1672, had no cognizance in civil causes.

THE office of justiciar or justice-general was made hereditary in the family of Argyle; but, previous to the regulations 1672, that jurisdiction was resigned to the crown, with reservation of the same over the shire of Argyle and western isles, whose jurisdiction was thus purchased for most valuable considerations, *viz.* the surrender of the like jurisdiction over the rest of the kingdom. But his grace, the present duke of Argyle, did not oppose the bill for taking away that high jurisdiction, together with the other eminent heritable jurisdictions in Scotland, in the terms mentioned in the statute^g; the public good being concerned in abrogating all such jurisdictions. Wherefore, at present, the court of justiciary's jurisdiction extends over all North-Britain, and the circuit-courts are holden for the shire of Argyle, as well as for the other counties in Scotland, which before that statute was not the case.

^g 20 Geo. II.

5. The office of justiciar over all Scotland of old, made hereditary in the family of Argyle; how thereafter established. This now abrogated with the other high heritable jurisdictions.

THE court of justiciary, by the regulations 1672, consists of the justice-general, justice-clerk, and five lords of session named by his majesty, and having commissions from him; and hence they are called

6. Constitution of the court of justiciary by the act 1672.

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called Commissioners of Justiciary. Those are all invested with an equal power and jurisdiction in all criminal causes. The justice-general, when present, presides, and otherwise the justice-clerk; and in absence of both, the lords elect one of their number for that purpose.

7. The office of the justice-clerk of old, and thereafter; at present, next in dignity to the justice-general. The manner of bringing criminal causes before the court.

THE justice-clerk has been, ever since the regulations 1672, not only one of the judges, but likewise next in dignity to the justice-general, as above. But it is certain, that formerly, as he is termed Clerk, so truly he was clerk to the justiciar, and is expressly so designed in an old statute^a; and, long before that time, he is named Justice-clerk, and as having the charge of the rolls, containing the names of persons indicted at the justice-airs^b; and the clerk of justiciary still has his commission from him, and so is his deputy. His business appears, from those and other acts, to have been to take up dittays, *i. e.* to make inquisition of persons suspected of crimes, and thereon to form indictments against those that were to be tried at the justice-airs or circuit-courts. This came to be committed afterwards to the clerk of justiciary, properly so termed, when the justice-clerk was advanced to be an officer of the crown, which must have been before the regulations of the justice-court in the 1587, for he is mentioned as such in a preceeding act of the same parliament^c. These dittays were taken up by way of a Porteous-roll; and the persons therein contained were indicted to be tried at the then eyer or circuit-court. And this being at last frequently used as a handle of oppression, by arbitrarily putting persons in such roll, perhaps at the instigation of others, or taking money for leaving them out, was justly abolished^d; and indictments ordained to be made by presentments from the justices of peace, or judges ordinary, and magistrates of borows, a reasonable time before each circuit, as the act directs; without prejudice to trials, upon special letters before the circuit-court, in the same manner as before the court of justiciary.

^a P. 1493.
c. 45.

^b P. 1449.
c. 28.
P. 1491.
c. 45.

^c P. 1587.
c. 31. intitl-
ed The king's
revocation,
post. med.

^d 8 Annæ,
c. 14.

8. What appeals in civil and in criminal causes competent before the circuit-courts.

By the late act^e, appeals from inferior judges in civil causes, not exceeding 12 *l.* Sterling, may be brought before the circuit-court, and there determined; but which regulation is only to be in force for 10 years, after 25th March 1748; and in criminal matters, not inferring loss of life or demembration, appeal may likewise be made to the circuit-courts, in manner prescribed by the statute. I have discoursed more at large of circuit-courts, as regulated by the said late act, and other matters thereby introduced, elsewhere^f.

^e 20 Geo. II.

^f B. 3. tit. last.

9. Appeals may be served against the inferior judge, for censure, or reparation of damages, in case of wilful injustice.

I SHALL only take notice, by the way, that as the justice-airs or circuits were introduced for the ease of the subjects, as to the trial of crimes, so they are made more useful, as a court of appeal in civil and criminal cases of lesser moment. And if the sheriff-deputes who, by the new regulation, are the judges, (the sheriffs principal being debarred from judging) and must be advocates, malverse in their office, they may, upon a regular complaint, be subjected to a trial, the last day of the circuit-court, as our old law prescribes^g. And indeed parties who appeal may conclude for censure, or reparation of damages against the sheriff-deputes, or other inferior judges, in case of wilful injustice, oppression, or other malversation by the foresaid late act.

^g P. 1487.
c. 103.

^a P. 1672.
c. 16.
P. 1681.
c. 22.

^b 10 Annæ,
c. 32.

^c 20 Geo. II.

FOUR of the lords of justiciary are a Quorum, except that in time of the vacation of the session three are declared a quorum, and regularly two constitute the court at circuits^a. These circuit-courts are in three several divisions or districts, and were holden formerly once in the year, *viz.* in April or May, and two were appointed to each circuit, and to hold courts at the respective places within their division or district, as mentioned in the statute. But the king might likewise have ordered circuit-courts to be holden in October, by a proclamation in July preceeding^b; and, by the late act, they are to be held twice in the year, *viz.* in April or May, and in September or October, and one judge may officiate, if his colleague is necessarily absent^c.

10. The quorum of the justice-court; its circuits.

^d 20 Geo. II.

^e P. 1587.
c. 91.

^f Coke 3.
inst. p. 217.

ALL actions before the lords of justiciary, whether in their stated and full court at Edinburgh, or in their circuit-courts, proceed upon a trial by an assize, inquest or jury of 15 persons, chosen out of a list of 45, of which, and of the list of witnesses, a copy must be given to the defender at executing the summons against him, and which must be done 15 days before the diet of compareance. The diets before the court are Peremptory; and, if the party does not appear at the day prefixed, he is denounced fugitive from the law, and the escheat of his moveables declared to belong to the king. When the pannel (as the defender in a criminal action is generally termed with us) is listd in judgment, the indictment is read to him, and he is asked, Whether he confesses or denies it? and if he denies it, the relevancy or sufficiency of it is argued by the lawiers on both sides, and thereafter the pursuer, by the former course, gave in to the court his information in writing; and the defender, after seeing it, gave in his; and, if any thing new occurred, it might be moved before advising. Thereafter the court advised the informations, and pronounced their judgment on the relevancy of the libel. This was the course by the regulations 1672, and was always observed till the late act^d, which allows the court to dispense with informations upon the relevancy, when they see cause, and likewise to appoint informations in every step of the trial where difficulty occurs. The same form would be observed, if the pannel should say nothing to the libel, but stand mute^e. For our law, by no means, allows to press a man to death for his obstinacy in not answering; which is the course of proceeding in England, in the case of petit treason and felony: but, on the party's standing mute, in the case of high treason, the judgment is the same, without farther trial, as if he had been convicted^f.

11. The manner of citations before this court; the trial is by an inquest of 15 men. The procedure before, and since the act 20th of the king.

^g P. 1587.
c. 91.

^h 21 Geo. II.
c. 19.

THE probation must be led in judgment, in presence of the assize or jury, before the party accused, and his procurators^g. The testimonies of the witnesses behoved formerly to be taken down in writing, in every case, which was troublesome, and to little purpose; and therefore, by the late statute, the court may dispense with that formality, except in cases of life or demembration^h. After the probation is concluded, one of the advocates for the pursuer sums up to the jury his evidence, and then one of them for the defender; whereupon the inquest inclose, in order to advise it, and return their verdict. If any person speak to any of the jury, after they are inclosed,

12. The probation must be led in judgment, in presence of the assize; the procedure after the proof led: the duty of the jury.

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before pronouncing the verdict, it is sufficient ground for an acquittal in favour of the pannel^a. The affize choose one of their number to preside, who is called the Chancellor of the Jury, and the major part determines the verdict; which is signed by the chancellor, and as many more of the jury as please, and then it is delivered to the court sealed.

^a P. 1587.
c. 92.

13. The verdict either general or special; the procedure of the court in both.

THE court advise the verdict, and pronounce such sentence as is warranted thereby. The verdict is either General, finding the pannel Guilty, or not Guilty; in which case the court is tied down to pronounce a sentence condemnatory or absolvitor, according to the tenor of the verdict: or it is Special, finding the several facts charged in the libel, or alledged in the exculpation, and sustained in the interlocutor thereon, or part of them, Proved or not Proved; in which case the lords are at liberty to pronounce such sentence, or inflict such punishment as they judge adequate to the facts found proved.

14. Remedies to prevent vexatious accusations by the civil law and ours.

PRECOGNITION is frequently taken of the facts, before criminal letters are given out, to prevent calumnious accusations, and sometimes a signed information touching the facts, without any previous inquiry, founds such prosecution. In cases of high treason, it was specially provided, by statute with us, that he who accused another of treason, of which he was acquitted, should incur the pains of treason whereof he had accused the other^b. And this rule was followed in accusations of all kinds among the Romans, to deter people from groundless and malicious delations^c. In other crimes, it is ordained by our law, that the court allow expences to parties accused, who are either acquitted or past from^d.

^b P. 1587.
c. 49.
^c L. 7. pr. et
§ 1. ff. de accus.
^d Quon. attach. c. 31.
61. reg. maj.
l. 4. c. 21.

15. The case of trial by singular combat, or by fire or water.

OF old the person accused had his election, whether to vindicate himself by Singular Combat, or to pass to the knowledge of affize, that is, to be tried by a jury^e. But some might decline battle, as women, men past 60, or maimed; and such behoved to cleanse themselves by the judgment of God, (as it was called) *viz.* their holding hot iron in their hands, or drinking boiling water, without complaining of any pain^f.

^e Reg. maj.
l. 4. c. 2.

^f Ibid.

16. This trial by fire or water thereafter taken away, as likewise that by singular combat.

BUT thereafter all trial by fire or water was taken away^g, as an absurd and superstitious invention. It does not appear when the trial by combat was abolished; only we find it was in use in the time of Robert III. in occult capital crimes^h, where a competent proof could not be had; but, after this period, I have not observed any vestige of it in our law-books.

^g Stat. Alex.
II. c. 67.

^h Stat. Rob.
III. c. 16.

17. The inquest of old, in trials for life or lands, consisted of landed men.

OUR ancestors had such regard to the life, liberties and rights of the subjects, that juries or affizes for life or lands behoved, of old, wholly to consist of freeholdersⁱ. At present, peers must be tried by their peers, and landed men by an affize, of which the major part must be such, without distinction, as to the crime which is the subject of accusation.

ⁱ Stat. Alex.
II. c. 3.

18. In criminal trials probation was

PROBATION was taken in criminal trials, antiently, with close doors, as was the case in civil matters: but, as the lords of session were

^a P. 1693.
c. 41, 27.

were ordained to advise causes with open doors ; so at the same time were the lords of justiciary, that such trials might be the more solemn, as being of great importance to the good of the subjects^a. Without prejudice to their removing all persons, but parties and their procurators, the witnesses and the jury, in taking probation, in cases of rape, adultery, and the like ; it being frequently of bad influence that the particulars on these occasions should be exposed in public hearing, or come to the knowledge of the multitude ; which might detract from the solemnity of the trial, instead of maintaining it.

taken with close doors ; this altered, but still the lords, in special cases, may take it with close doors.

^b 11 Geo. I.
c. 25.

THAT criminals may be apprehended and duly prosecuted, the freeholders, in their head-courts, may assess the county, as they see reasonable, to raise a fund for defraying the charges of seizing offenders, maintaining and prosecuting them by due course of law^b. Such fund is vulgarly called Rogue-Money.

19. The freeholders, at their head court, may assess the county in rogue-money.

^c 3 Geo. II.
c. 32.

SENTENCES in criminal cases, inferring a capital or corporal punishment, pronounced by the justiciary or circuit courts, cannot be put to execution till the expiry of 30 days on the south side of Forth, and 40 days on the north side thereof. But those pronounced by inferior judges, importing corporal punishment less than death or disembodiment, may be put to execution, after elapsing of eight days on the south side of Forth, and 12 on the north of it : however, the lords of justiciary may sist execution for 30 days^c.

20. When may criminal sentences be put in execution.

^d 5 Geo. I.
c. 27.
^e Art 19.

It is to be observed, that when a British statute, extending to this country, enacts a crime, tho' it mentions the same to be triable before the courts of Westminster, without directing where it is to be prosecuted, when committed in Scotland, as is sometimes done^d, yet the same is to be tried before the court of justiciary, to which are saved all its powers and privileges, by the article of the union^e ; for, as to all crimes committed in Scotland, that court regularly is competent, and consequently such statutory crimes committed here must be sued before the same, or go unpunished. Thus, where a statute in England, before the union, enacted any thing to be a crime, and directed the same to be prosecuted before a certain court, yet if it did not provide, *That it should not be sued elsewhere*, the other courts, that would have been competent at common law, if no such particular court had been specified, have jurisdiction likewise in it. For, in the words of the lord Coke, " If the meaning of such statute were " to exclude other judges than those that are named, there must be " words negative, as, Not in any other court, or, Not before any other " judges^f." And, by the same rule, where a British statute mentions particular judges for cognoscing in any crime thereby enacted, without such exclusive words, the judges ordinary, either in South or North Britain, respectively, must be competent to try the same, as the crime happens to be committed in the one or the other part of Britain.

21. If a British statute enacts a crime, and mentions the trial to be in the courts of Westminster-hall, such crime, committed in Scotland, must be tried before the justiciary.

^f Coke 2.
inst. 448.

DIVERS crimes belonged to the cognizance of our privy council, now abolished ; and I should think that the justiciary, in such matters, has the proper jurisdiction : however, for the greater security, this court is, in some cases, expressly vested with the jurisdiction that formerly

22. Crimes, of old cognoscible by our privy council, are now to be

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tried by the
justiciary.

merly was committed to the privy council, as inflicting penalties upon Jesuits, priests, and trafficking papists, by the act 1700^a; but that cannot infer, that the court of justiciary, which is our supreme court in criminal matters, might not have judged therein without such statute.

^a 12 Annæ,
c. 13.

23. Informations, previous to determining the relevancy, may be superseded; but they may be ordered in any part of the trial, as occasion requires.

By the late act^b, informations in criminal causes, after the debate on the relevancy, need not be given in by the parties, as was directed by our statute 1672, as above; and the clerk is only to take down in writing the substance of the pleadings, whereupon the judges are to pronounce their interlocutor upon the relevancy, and, if sustained, proceed to the trial. But the court may, in the trial of any crimes, (other than high treason) in case of difficulty or importance, direct informations in writing to be given in by the procurators for the pursuer and the pannel respectively, in any part of the trial; whether after debate upon the relevancy, or import of a special verdict, or on the degree of punishment, or upon any matters that shall be alledged for the pannel before judgment.

^b 20 Geo. II.

24. The punishment and forfeiture, upon a sentence in a capital crime; or on a denunciation for not appearing to abide a trial.

A SENTENCE condemnator, in capital crimes, except treason, infers only the pains of death, but no corruption of blood. The consequence of it is likewise a forfeiture of the delinquent's moveables, but not of his lands or other heritable rights. A denunciation against a party for not appearing to undergo trial in a criminal prosecution, infers a forfeiture of his moveables; and likewise of his lands, and heritable rights for life, if he remain under it for year and day.

25. In a trial for the crime of falsehood, where the party is remitted to the justiciary, how far the decree of the lords of session is evidence to the jury; may a trial be directly carried on before the lords of justiciary in such crime.

IN a trial for the crime of falsehood of writings, where the person found guilty by the lords of session is remitted to the court of justiciary, the jury seems to be at liberty to consider the proof led before the lords of session, and how far they think it sufficient to subject the pannel to the punishment libelled^c. The decree of the court of session is alone laid before the inquest, as a proof of the crime, without leading the witnesses before them anew, which might be of pernicious consequence; nor is this manner of procedure, which is authorised by immemorial usage, contrary to the statute^d, which ordains, That all the probation shall be led in presence of the assize. The decree of the lords is the only document of guilt used by the pursuer, and this is laid before the jury, which satisfies the terms of the statute. Tho' falsehood of writings is ordinarily tried before the court of session, in the first instance, yet nothing hinders the whole trial to be carried on before the justiciary, where the proof of the crime is not intricate: for, as I conceive, it is only the difficulty in proving the fact, which often depends on a variety of circumstances, that made it cognoscible before the court of session in the first instance.

^c Ann. 1731.
in the trial
of John
Campbell,
&c.

^d Ja. VI.
P. 11. c. 90.

26. Cases of high treason, and misprision of high treason, regulated by the law of England; the

CASES of treason are now regulated by the law of England^e; wherefore all crimes and offences, by this act, that are high-treason, or misprision of high-treason in England, and no other, must be judged such within Scotland. And the justice-court is to proceed thereon in the same manner as the court of king's bench may do by the laws of England; and the king may issue out a Commission of Oyer and Ter-

miner

^e 7 Annæ,
c. 30.

miner to such persons as his majesty shall think fit, three of the lords of justiciary always being in the said commission, whereof one to be of the Quorum, to enquire of, hear and determine those crimes, in such manner as is used in England. Persons attainted of high treason, or misprision of high treason in Scotland, are subject and liable to the same corruption of blood, pains, penalties, and forfeitures, as persons convicted or attainted thereof in England.

procedure in it.

^a 7 Will. III. c. 3.

By special statute in England^a, The person accused of high treason, or misprision of high treason, whereby corruption of blood may ensue, shall have a full copy of the indictment, at least five days before the trial, and two witnesses, either both of them to the same overt act, or one of them to one, and the other to another overt act of the same treason are required. But if two or more distinct treasons, of divers heads or kinds, are alleged in one bill of indictment, one witness produced to prove one of the said treasons, and another to prove another of them, are not deemed witnesses to the same treason.

27. The party accused of high treason must have a copy of the indictment five days before the trial; two testimonies to the same overt act are necessary.

By the same statute, No person can be prosecuted for any high treason, or misprision of high treason, unless indictment be found against him, by a grand jury, within three years next after the treason or offence committed; but the designing, endeavouring, or attempting any assassination on the body of the king, by poison or otherwise, may be prosecuted at any time.

28. Within what time is a trial for high treason, or misprision of it, competent.

^b B. 3. tit. 3. sect. 1.

WHERE a bill of indictment is found against a party by a grand jury, within three years of the fact committed, process may thereon be issued, in order to an outlawry, at any time during his life; and if, in course of such procedure, he sists himself, he is to be tried by a special or petty jury. But if he suffer the outlawry to go against him, it has the same effect as a judgment upon conviction, whereon corruption of blood, and all other pains of high treason, are consequential; unless the outlawry be afterwards reversed, thro' informality of the procedure. I have observed in another place^b the form of proceedings in order to an outlawry for treason, and misprision of treason, upon an indictment found in Scotland, pursuant to the late

29. Outlawry, upon non-appearance to plead to an indictment for high treason, and the consequences thereof.

^c 22. Geo. II. c. 42.

statute^c.

^d D. 7 Annæ, c. 20.

AFTER the death of the pretender, any person indicted for high treason, or misprision of high treason, shall have a list of the witnesses and jury delivered to him with the copy of the indictment, at least 10 days before the trial, in presence of two witnesses^d.

30. The procedure in a trial for high treason, after the pretender's death.

THE standard-law in England, concerning high treason, is 25th Edward III. c. 2. which declares the several kinds or heads of it, viz. 1. To compass or imagine the death of the king or of his queen, or their eldest son and heir. 2. To violate the king's companion or eldest daughter unmarried, or the wife of his eldest son. 3. To levy war against the king in his realm, or to be adherent to his enemies by open deed, giving them aid or comfort in his realm. 4. To counterfeit the king's great or privy seal, or his money, or to bring false money knowingly into this realm, to merchandize or make payment therewith. This article is further enlarged by subsequent sta-

31. The several kinds of treason by the act 25th Edw. III.

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tutes ; and all abuses touching the coin of this realm in gold or silver, or as to foreign coin current in the realm, is made high treason ; and as to foreign coin not current, it is misprision of treason ; but the attainer proceeding upon those acts shall not infer corruption of blood against the offender, or make his wife lose her dower^a. 5. To slay the chancellor, treasurer, or king's justices, of one bench or other, being in their places doing their offices.

^a 1 Mary, c. 6.
1 and 2 Philip and Mary,
c. 11. 5 Eliz.
c. 1. 14 Eliz.
c. 3. 18 Eliz.
c. 1.

32. The treasons enacted since 25 Edw. III. and the above quoted acts.

THE person assuming the title of James III. of England, and VIII. of Scotland, characterised the Pretender, was attainted of high treason by an English statute^b. By this act it is declared, That if any subject shall correspond with the said pretender, or with persons employed by him, knowing them to be so employed, or pay or remit money for his use and service, he shall be adjudged guilty of high treason. Such correspondence with, or remittance to any of the pretender's sons, is likewise by a British statute declared high treason, and that, if they or any of them shall land, or attempt to land in Great Britain or Ireland, or any dominions belonging to the crown of Great Britain, they shall stand and be adjudged as attainted of high treason^c. Therefore, in virtue of this act, the pretender's eldest son stands attainted of high treason, by his landing in Britain in the year 1745. Farther, it is the crime of high treason, maliciously, advisedly and directly, by printing or writing, to affirm that any person hath right to the crown of Great Britain, and dominions thereto belonging, otherwise than according to the act settling the succession thereto in the protestant line ; or that the kings or queens of England, by the authority of parliament, cannot make laws to limit and bind the crown, and the descent and government thereof : and to maintain the same by preaching, teaching, or advised speaking, infers a *premunire* ; but information touching such words spoken must be given to some justice of the peace within three days thereafter, and the prosecution commenced within three months after the information^d.

^b 13 Will. III.
c. 3.

^c 17 Geo. II.
c. 39.

^d 4 Annæ,
c. 8.

33. The several statutory treasons, by the law of Scotland, made only capital crimes.

THE several crimes which were declared to be treason by special statutes in Scotland, *viz.* theft in landed men, murder under trust, willful fire raising, firing coal-heughs, and assassination, are only to be deemed thereafter capital crimes, and punishable accordingly^e. By the same act, the slaying any of the lords of session or judiciary, sitting in judgment in the exercise of their office, is adjudged high treason. As likewise is the counterfeiting any of the king's seals appointed by the articles of the union to be used and kept for Scotland.

^e D. 7 Annæ,
c. 20.

34. Prosecutions before the judiciary are either at the instance of the king's advocate solely, or with his concurrence.

ALL criminal libels before the judiciary are either at the instance of his majesty's advocate solely, as procurator-general ; or at the instance of the private party injured by the crime, with concurrence of the lord advocate, who, in conjunction with his majesty's solicitors, and such advocates as on occasions are assumed to assist, takes care of the trial, as council for the pursuer : and the pannel either chooses advocates for himself, or, on his application, they are appointed by the court.

35. The jurisdiction of the court of judiciary.

THIS court has the only original jurisdiction in the four pleas of the crown, *viz.* Murder, Robbery, Fire-raising and Rape ; as well as a superior

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superior jurisdiction in other crimes: and criminal prosecutions before inferior courts may be advocated to it, the procedure in which is similar to that before the court of session. The first question is, Whether the cause shall be advocated or not? the competent grounds whereof have in part been already observed^a, and shall be farther discoursed upon, when I purposely treat of advocations. If the court find just ground for advocating, then the pursuer must find new bail to prosecute the cause to an issue before the court of justiciary, and the defender must also renew his bail, to undergo a trial before them, if the crime isailable, but otherwise must continue in prison till the issue. This court may likewise review, by suspension or reduction, the sentences of inferior criminal judges, so far as they are not sufficiently founded or supported by the verdict. I have taken notice in the preceeding title, how far the court of session is founded, in advocating from, or suspending the decrees of inferior judges in criminal matters. The reader, who wants to know farther particulars, in relation to these, or other proceedings before the court of justiciary, either in their solemn courts in Edinburgh, or at circuit-courts, will find them minutely described by a late writer^b. I shall only here observe, that, before the regulations 1672, the court of session was in use to appoint assessors to the justice-general^c.

^a Louth. form of proceedings before the justiciary, printed anno 1732.
^b Act of sed. Decem. 26. 1634.

Observations on the Law of England, in relation to the Premises.

THE court of king's bench is intrusted with the highest jurisdiction in England, as to criminal matters, and may proceed therein, as well upon indictments found before other courts, and removed into it by *certiorari*, as on indictments or informations originally commenced before themselves. However, if the justices perceive, that the intention of such removal is the delay of justice, they may, in their discretion, refuse to receive the same, and remand the cause back to the inferior court, for the greater expedition of justice^a. This court, being the highest court of common law, hath not only power to reverse erroneous judgments given by inferior courts; but also to punish all inferior magistrates, and other officers of the law, for wilful and corrupt abuses of their authority, contrary to the known principles of law and justice^b.

^a Hawk. b. 2. c. 4. § 3. 6.

^b Ibid. § 10.

^c Vin. (indictment) 368.

HE that owes no allegiance is not indictable, by the law of England, as an alien enemy^c. All misdemeanors of a publicly evil example, against the common law, may be indicted; but no injuries of a private nature are the subject of an indictment, unless they somehow concern the king.

1. The eminent jurisdiction of the court of king's bench, especially in criminal cases.

2. An alien enemy cannot be indicted; the subject of indictments.

WHERE a statute adds a farther penalty to an offence, prohibited by the common law, the offender may be indicted, either upon the statute, or at the common law, in the election of the prosecutor^d.

^d Ibid. 371.

WRITS of error, to reverse judgments in criminal causes, are not granted *Ex debito justitiæ*, but *Ex gratia regis*, upon the *fiat* or consent of the attorney-general; or upon a petition from the party to the king, who will thereon give directions to inspect the proceedings,

3. What if a penalty is added to an offence prohibited by the common law.
4. When may a writ of error take place in a criminal case.

to

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to see if they be well founded, or if the writ of error is only sought for delay ^a.

^a Ibid. p. 402.

3. Outlawry for treason or felony, is the same as a sentence upon conviction; but no warrant for execution awarded.

NOTWITHSTANDING that, upon outlawry in treason, or felony in England, the offender loses and forfeits as much as if he had appeared, and judgment had been given against him, as long as the outlawry is in force; yet, in such case, there is never any award of execution against the party till he is brought to the bar; because there may be a mistake in the person, or something may have happened since the judgment, why execution should not be awarded ^b.

^b Vin. tit. (absence) p. 111.

6. One is said to be convicted before judgment given, and attainted when judgment is given against him.

AN attainder is the conviction of a crime, and judgment given thereon, against one who was not convicted and attainted before: for, by the law of England, one cannot be twice attainted. One is said to be convicted, by verdict or confession, before he has judgment; and when he has judgment upon verdict, confession, or upon outlawry, then he is said to be attainted ^c.

^c Vin. tit. (attainder) p. 12.

7. What if a person attainted is slain without authority.

THO' judgment be given against one for treason or felony, yet his body is not forfeited to the king till execution; and, if he is slain without authority, his wife may have an appeal of the murder, for he was still her husband; and a person attainted may be taken in execution for debt, and during the prosecution he may be sued ^d.

^d Vin. ibid.

8. Or if one attainted is beaten, or a woman attainted is ravished.

IF one attainted be beaten or maimed, or a woman attainted be ravished, they may have action after they are pardoned. But, tho' a person attainted be pardoned, he cannot take by descent, for the corruption of blood still remains, which cannot be removed without an act of parliament; but the king's pardon enables him to purchase lands, and a son who shall be thereafter begotten shall inherit them ^e.

^e Ibid. 239.

T I T. X.

The Jurisdiction of the High Constable.

1. The jurisdiction of the high constable; it is hereditary; and reserved, by the late act.

THE High Constable of Scotland had an eminent criminal jurisdiction of antient standing ^a. It has been hereditary in the family of the Earls of Errol for some ages past. And tho' the other heretable constabularies are extinguished by the late act ^b, yet the jurisdiction of the high constable is reserved.

^a Leges Malc; II. c. 6.
^b 20 Geo. II.

2. The limits of the high constable's jurisdiction.

IN order to ascertain the jurisdiction of the high constable, a commission under the great seal was appointed to take trial of the same; and the commissioners, having examined all the evidents and documents touching the same, reported, That the high constable is supreme judge to all riots, disorders, blood and slaughters committed within four miles of the king's person, or of the parliament and privy-council, where any of these courts are sitting. And Sir George Mackenzie informs us, he had seen the commission and report to the above effect ^c.

^c Crim. part 2. on this court.

THO'

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THO' this jurisdiction is saved, there can be no occasion for the exercise of the same, unless his majesty shall happen to be in this part of the united kingdom, or that the parliament of Great Britain shall be holden in this country; for our lord high constable can exercise no jurisdiction within the limits of England.

3. Can there be place for the exercise of this jurisdiction at present.

OTHER heritable constabularies are abolished by the above quoted act. They were regularly keepers of the king's castles, and had for most part, either by grant or prescription, the privilege of riding fairs, and holding courts of fairs in the adjacent royal borows; and were accustomed, on such occasions, to exact unreasonable dues, which were prohibited and discharged^a: but those constables were found to have no jurisdiction as to fairs granted to any such borow after the date of their rights of constabulary^b. The bailties of borows must exercise the foresaid jurisdiction, in relation to fairs, now that constabularies are abrogated.

4. The jurisdiction of other heritable constabularies before they were abolished.

^aP. 1456. c. 5.
P. 1469. c. 3.
^b July 18.
1676. Earl
Kinghorn.

NOTWITHSTANDING that the jurisdiction of the lower constabularies is extinguished; yet the lands, rents and duties annexed or belonging to the said offices, are reserved to the possessors; their heirs and successors, and continued to be enjoyed by them, conform to an express proviso in the foresaid act.

5. The lands, rents and duties annexed to the lower constabularies, still reserved to the owners, tho' the office is extinguished.

Observations on the Law of England, in relation to the Premises.

THE court of the high Constable and Marshal of England has a criminal jurisdiction of no small importance: it is declared, limited and restrained by certain statutes^a, before which there is not any thing memorable on record touching them^b.

1. The jurisdiction of the court of the high constable and marshal in England.

^a8 Rich. II.
c. 5. 13 Rich.
II. c. 2.
1 Hen. IV.
c. 14.
^bHawk. b. 2.
c. 4. § 7, &c.

IT appears from these statutes, that the court holden by the constable and marshal had jurisdiction in contracts and deeds touching arms, and of war out of the realm, and of things that concern war within the realm, which cannot be determined by the common law. As likewise disputes concerning precedency and points of honour, and satisfaction therein, were proper for this court; but there has been no court holden before a constable these many years. The lord Marshal cannot determine in an appeal of death, or in treason, without the constable. The office of high constable was antiently hereditary; but, being of high authority, it hath been only granted *pro hac vice*, ever since the reign of Henry VIII^c.

2. The business of this court; the office was of old hereditary, but ther after *pro hac vice* only.

^cIbid. § 9.
Coke 4. inst.
c. 17.

THIS court, in their proceedings, follows its own customs and usages, so far as they go; and in other matters, the rules of the civil law, which is as much the law of England, in such cases wherein it has been always used, as the common law is in others. And, because this is not a court of common law, Error in their proceedings cannot be remedied by writ of error, but only by appeal to the king^d.

3. This court, in their proceedings, follows their own usages, and the civil law.

^dIbid. § 10.

THE court holden by the constable and marshal, is called in England *The Court of Chivalry*. This court is said to be the fountain of the martial law^e.

4. It is called a Court of Chivalry, and is the fountain of the martial law.

^eCoke 4. inst.
p. 123.

T I T. XI.

The Court of Exchequer.

1. The establishment of the court of exchequer; its members; who may be named barons of exchequer; they hold their office for life; how far the members of the court intitled to the privileges of the college of justice; who intitled to plead before them; the precedency of the barons.

THE jurisdiction of the court of Exchequer is chiefly, if not solely, in civil causes, touching the revenue of the crown. That court, as it is now established, was settled by the British statute, in place of the court of exchequer in Scotland, at the time of the union^a. It consists of the lord high treasurer of Great Britain, lord chief baron, and four other barons; and of the chief baron, and other barons in absence of the lord high treasurer; with clerks, and other officers thereto belonging. The barons hold their office *Quamdiu se bene gesserint*, or during their life and good behaviour. They are created by the king's letters patents, of such as have been serjeants or barristers at law of five years standing, in some of the inns of court in England; or advocates in the college of justice for the said space in Scotland. The members of this court are intitled to all the privileges and immunities competent to the members of the college of justice, by the forementioned statute. But the clause in the subsequent statute^b, which ordains, That the slaying any of the lords of session or justiciary, sitting in judgment, shall be adjudged high treason, does not specify the barons of exchequer, which privilege therefore does not extend to them. The lord president of the court of session has the precedency of the lord chief baron; but he precedes the other lords of session; and the ordinary lords and barons have precedency, according to the priority of their respective admissions^c. All barristers at law, advocates or counsellors, who may plead before the court of exchequer in England, or court of session, may do the same before the court of exchequer here.

^a 6 Annæ, c. 25.

^b 7 Annæ, c. 20.

^c Letter from the queen settling the precedency of the courts of justice in Scotland. Nov. 18. 1729. acts of sed. p. 263.

2. The subject of their jurisdiction, all matters concerning the king's revenue in Scotland.

ALL matters concerning the king's revenue, debts or duties, lands and hereditaments, or other profits, benefits and casualties belonging to the king within Scotland, by virtue of the royal prerogative, or any other right or title whatever; and all remedies and means for recovering the same are within the jurisdiction and authority of this court, and annexed thereto.

3. It is a court of equity, wherein the procedure is by English bill.

IT is a court of equity, enabled to hold plea, by English bill, petition or suit, to be exhibited by, or against the attorney or advocate-general on his majesty's behalf, or for his interest, or against any persons concerned in or about the revenues, debts or duties due to the crown, touching the said revenues, or any discovery or relief, in equity, concerning the same. The defendant's answer must be here upon oath, and the court make their order or decree upon advising the bill and answers, and examining witnesses or parties, without putting the matter in issue to trial by a jury.

4. In case of the plaintiff or defendant's dying, a bill of revivor must be exhibited for or against the representatives of the deceased.

IF a defendant die after he has answered, and before the cause is determined, the plaintiff may exhibit a bill of revivor against the heirs or executors of the deceased, as he finds cause; and in a bill of revivor, the defendant shall answer without oath, since the intent of his answer is only to submit himself to the former proceeding, which, upon his answer, is revived, and shall stand in the same force as it did against the former defendant that died, and thereupon the party shall proceed to bring the cause to a final determination. In like manner,

manner, when a plaintiff dies, pending a suit, his heirs or executors may revive the cause by a bill of revivor, and thereafter proceed therein in order to a decision ^a.

^a Compl. solicitor, p. 317.

If a decree be in any thing disobeyed, either by the plaintiff or defendant, upon an affidavit made thereof, an attachment is awarded against him that made the contempt, and farther process of contempt shall be issued until he is brought into the court; and if, upon examination, it shall appear to the court that he is in contempt, the court will commit him to prison, and fine him or not, as the case requires; and he is to remain in prison until he give obedience, and submit himself to the court, to perform the decree, and to pay such costs to the prosecutor as the court shall tax. But if, upon examination, the defendant is found not to be in contempt, he may move the court to be discharged, with costs ^b.

^b Idem, p. 319.

In the exchequer there is likewise a court of common law, where the causes are tried by a jury of 12 men of the county, or place where the matter in issue did arise, or where the court orders the same to be laid and tried, according to the course of the common law in England. Each jurymen must have five pounds Sterling of yearly rent, in fee or liferent, or be worth two hundred pounds in personal estate; and in all verdicts to be given by the juries, the whole number of twelve must agree, as in England; and in every other thing, those trials are after the course of the common law of England.

5. Upon disobedience to the decree of the court, the party in contempt liable to an attachment.

6. It is likewise a court of common law, where the trial is by a jury of 12 men, who must all agree; the qualifications of jurymen.

As the form of procedure before this court, whether by English bill or at common law, is according to the course and common method of proceedings before the court of exchequer in England, so the judgments of the court, as a court of common law, are reverfible only by suing and prosecuting a writ of error thereon, out of the court of chancery in England, returnable in parliament, and the method of proceedings therein is the same as on writs of error, upon any judgments in the courts of England; of which, and the remedy competent in relation to proceedings upon English bill, more hereafter.

7. Relief is competent, by writ of error, against judgments of the court of exchequer, in trials by a jury.

As all suits and prosecutions upon obligations and securities, for any revenues, debts, or duties due and payable to the crown within Scotland, can only be in this court, so his majesty is declared preferable in all suits and proceedings in the said court, according to the statute 33 Henry VIII. ^c And all execution, personal and real, proceeds against the debtor to the crown, and their personal effects, for payment of such debts, duties or revenues, according to the course and practice of the court of exchequer in England. Wherefore it is necessary to observe how the case is ruled by the law of England; which I shall do, both as to the personal and real estate.

^c C. 39.

8. All suits, upon obligations or securities for debts due to the crown, only competent before the exchequer; and in those the king is preferable, conform to the act 33 Hen. VIII.

The king's personal execution, upon the chattels personal or real, has no relation to the time of becoming addebted to the king, nor to the time of the writ brought, or to the time of the judgment given for the king, but to the award of the execution; for by it the goods and chattels are bound, into whosoever's hands they shall come ^d.

^d Vin. (pre-rog. of the king) p. 513.

9. Rules touching the king's prerogative, as to execution for debts upon the lands or chattels of his debtors.

WHERE

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WHERE the king's debt is prior on record, it binds the lands of the debtor into whose hands soever they come; because it is in the nature of an original feudal charge on the land itself, and therefore must subject every person that claims under it; but if the lands were aliened by the party in whole or in part, as by granting a jointure to his wife before the debt contracted, such alienee claims prior to the charge, and therefore is not subject to it^a. If the subject's debt be a statute-staple, or judgment, and prior to the king's debt, and the king first extends the land, the subject shall not, by any after extent, take them out of his hands. But if, on such judgment, the land be extended, and the subject has the possession delivered to him, by a writ called *Liberate*, he shall hold it discharged from the king's debt; but if the king's extent comes before the possession is delivered, the king's extent shall be preferred, and the subject must wait till the king's debt is satisfied: the reason is, because the king's debt is in the nature of a feudal charge, as above, which, if it comes on the lands before the property of them is altered, it seizes them, as it might for the original service first imposed; and the property of the lands is only altered by the extent and livery, pursuant to the statute-staple, or judgment, to the time whereof the extent relates^b. And farther, the lien upon the lands, by the subject's debts, only came in by the statute^c; for, before that, the judgment did not bind the land, but the king's debt bound the land before that statute, which does not touch his prerogative. And therefore the king has a power to levy on the lands, notwithstanding the preceeding lien by judgment, while the lands are in the custody of the law on the Elegit or extent, before they are actually delivered out to the officer by the *Liberate*, as a satisfaction for the debt^d.

^a Moor's rep. 126.

^b 2. Roll. 156. Vin. (prerogat. of the king) 515.
^c Westm. 2. or 13 Edw. I. c. 18.

^d Gilb. rep. p. 97.

It is provided by statute^e, That the subjects execution shall cease till the king be satisfied; but this is intended of execution, by which the king seizes lands or goods, but not of execution against the body of the debtor^f. If the king's debt is of equal degree with that of a common person or subject, the king's debt shall be preferred; but if the subject's title is prior to the king's, it must be preferred. And regularly, wherever the king is intitled to a fine or duty by the suit of the party, the party shall be first satisfied as to what is due to him^g. The king shall not levy any debts upon lands or rents, so long as the debtor has goods or chattels to satisfy; nor shall the pledges be distrained while the principal debtor is sufficient^h. The king's debt, or dying testate, the king shall be satisfied before the executorⁱ, upon the statute of Henry VIII.^k

^e 25 Edw. III. c. 13.

^f Vin. ibid. p. 518.

^g Ibid. p. 519.

^h 9 Hen. III. c. 8.
ⁱ 9 Hen. III. c. 18.
^k 33 H. VIII. c. 39.

10. The king's preference, by the statute of Hen. VIII. as to moveables.

IN order to the king's preference, the suit is said to be then taken or commenced for the king, when the first step is made toward proceeding to execution, and which must be done before judgment given for the other person that competes^l. And by the same statute, the king shall have execution against the heir, tho' he be not comprised in the recognizance; but it is otherwise if such debt is only assigned to the king^m.

^l Hume (king) p. 525. Jan. 1724. commissioners of excise.
^m Vin. ibid. 520.

11. No real estate in Scotland can be

BUT, by the express terms of the foresaid statute, establishing the exchequer in Scotland, No real estate of any debtor, or accountant to

to the crown, can be subject or liable to any such debt, in any other manner or form than as is by the laws of Scotland directed, and which, in such cases, are to hold place and be observed. And the validity or invalidity, or preference of the king's titles to any lands, hereditaments, or casualties thereout, can only be judged and determined in the court of session, as is above mentioned.

affected by the debt due to the king, otherwise than conform to the laws of Scotland.

THE barons of exchequer have, by virtue of this act establishing the exchequer, the same power and authority to take and pass the accounts of sheriffs, and other officers concerned in the levying of any revenue or money for the crown, and to charge and discharge them according to right and justice, in the same manner as before the union: they have likewise power to receive resignations of lands, and other subjects in use to be resigned and received in the king's name; and to revise, compound and pass signatures, gifts of tutories, and other things which were in use to be presented, revised, compounded, or passed and given by the lord high treasurer, or commissioners of the treasury, or lords of exchequer in Scotland, at the time of the treaty of union.

12. How far the barons of exchequer have the like power as the lords of treasury in Scotland had at the time of the union.

WHERE any person conceives himself aggrieved by the proceedings of the court of exchequer, in relation to signatures, gifts of *ultimus hæres*, &c. or the like, he may sue a writ of appeal in the house of lords, in the same manner as in appealing against the decisions of the court of session; for in those particulars, our court of exchequer is not acting after the method of the court of exchequer in England, which hath no concern in matters of that kind; but, in that respect, is in place of our lords of treasury formerly, before the union.

13. The case of appeals as to passing signatures, or gifts in the court of exchequer.

THERE is not only the above difference between the powers of the court of exchequer in England, and those in our court, in relation to diligences affecting lands, and competitions touching the same, but likewise as to the extent of the jurisdiction, in another respect. For, in all cases where the plaintiff supposes he hath right to recover the possession of lands or goods, or debts due to him, or to have remedy for some wrong done to him, but hath no such evidence or proof as the common law requires, but alleges that it lies in the defendant's own knowledge, and that he will confess the truth thereof in his answer, upon oath, he may exhibit an English bill in exchequer against him for that purpose^a. And not only may persons privileged as officers or clerks of the court, and their servants, pursue their causes before the court of exchequer in England; but likewise all persons whatever, that are debtors or accountant to the crown, may sue their actions there against their debtors: and even the plaintiff's suggesting it in his bill is sufficient to intitle him to such privilege^b. whereas our court of exchequer hath the limits of their jurisdiction expressly prescribed to them, as above, which they cannot, in my humble opinion, exceed by any such feigned, or even real suggestion, in the plaintiff's bill or complaint.

14. Can persons, on suggesting in their bill that they are indebted to the crown, bring actions against their debtors, before the exchequer.

^a Compl. solicitor, p. 307.

^b Id. p. 308.

SOME difficulties occur with respect to the relief competent to parties that conceive themselves aggrieved by judgments in the exchequer, as a court of common law, which I shall endeavour to remove.

15. Difficulties as to suing writs of error out of the

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chancery of
England, a-
gainst judg-
ment of the
exchequer, as
a court of
common law.

It is declared lawful to a person, against whom such judgment is given, to sue a writ of error out of the court of chancery in England, returnable in the parliament of Great Britain: now, by the tenor of such writs, they concern only the proceedings in the courts of England, and so cannot regularly, as such, have course in Scotland. And next, by the treaty of union, it is declared^a, That no cause in Scotland shall be cognoscible or reviewed by the court of chancery, or any other of the courts in Westminster-hall; with which it may be thought that the above proceeding by writ of error is not consistent.

^a Artic. 19.

16. These
answered, and
shown, that
this is no-
way incon-
sistent with
the before-
quoted ar-
ticle of the
union.

FOR answer; by the above article of the union it is provided, That there shall be a court of exchequer in Scotland, for deciding questions concerning the king's revenue here, having the same powers as the court of exchequer in England; and the British act, pursuant thereto, establishing our court of exchequer accordingly, authorises the suing such writ of error out of the court of chancery in England, which is sufficient to give it course in Scotland, and to vary the stile of the same, so as to answer that end. Nor is this proceeding anyway inconsistent with the before-quoted article of the union; for, notwithstanding that the writ of error is sued out of the court of chancery in England, yet that is not in order to cognosce or review the judgments of our court of exchequer in the court of chancery, which indeed were inconsistent with that article of the union, but as a means to bring the cause regularly into the parliament, to be reviewed by the house of peers in the last resort: and it was a natural consequence, that since causes were to be decided in the court of exchequer, to be erected in Scotland, in the same manner as in the court of exchequer in England, the relief and redress, in case of supposed wrong judgment, to the party thereby aggrieved, should be the same likewise.

17. The pro-
ceeding up-
on a writ of
error.

IN the proceedings upon a writ of error, the complainant founds either upon an error in law, or in fact; and if upon an error in law, then the house of lords, after hearing the cause, give the final judgment, affirming or reversing the judgment complained of; but if it is an error in fact which is pleaded, as being discovered after the judgment given, the cause is remitted to the court below, to be tried anew in common course.

18. The re-
lief to par-
ties aggriev-
ed by the ex-
chequer, as a
court of e-
quity, the
same as be-
fore the
court of sessi-
on.

THE relief and redress competent to the party who conceives himself aggrieved, by an order or decree of the court of exchequer, as a court of equity, upon English bills, is ordained, by the statute aforesaid, to be the same as in like cases in the court of exchequer in England. This remedy is in way of appeal directly to the house of lords, and therefore of the same nature with appeals from the judgments of the court of session.

T I T. XII.

The Court of Admiralty.

1. The con-
stitution of
the admiral-

THE Lord High-Admiral of Scotland, before the union, was his majesty's lieutenant and justice-general upon the seas, ports,

ports, and creeks thereto belonging; and in fresh water, or navigable rivers, below the first bridge, or within the flood-mark, so far as the same does, or can at any time extend. He had the privilege and jurisdiction in maritime causes, foreign and domestic, civil or criminal, within Scotland^a. He exercised this jurisdiction by his deputies, the judge of the high court of admiralty, and the judges of the inferior admiralty-courts.

ty-jurisdiction before the union.

^a P. 1681.
c. 16.

^b Article 19.

By the union^b, All admiralty-jurisdictions are under the lord high admiral, or commissioners of the admiralty of Great Britain: but the high court of admiralty is still to remain with all the powers and privileges competent to it. The sovereign has always, since the union, appointed a lord-admiral or vice-admiral for Scotland, who gives commissions to the judges of the inferior courts of admiralty during pleasure; but the deceased Mr. James Graham of Airth, advocate, was judge of the high court of admiralty for life, the office being given in those terms by the last duke of Lennox, who had the heritable right of admiralty. However, the present judge, so far as his commission proceeds from the lord-admiral, can only enjoy the office while his constituent remains lord-admiral for Scotland, who is removeable at pleasure; but, to prevent such inconveniencies and hazard, he procured a commission from his majesty for life, confirming a grant of the office to him, by the lord-admiral, in these terms. And indeed this court being of great importance, it would tend to the good of the public, that the judge of that high court were independent of the lord-admiral; and that the office were always conferred by the king for life; since it were most inconvenient and prejudicial to the subjects to have such an eminent trust ambulatory, by the judges being removeable at pleasure. There are heritable rights of admiralties, and vice-admiralties, which are reserved, by the union, to the respective persons interested therein, as rights of property; and some of those are become extinct by the forfeiture of the persons vested with the same, on account of the rebellion 1715, and statutes consequential thereto.

2. The state of the jurisdiction of admiralty-courts since the union.

THIS court is declared to be A Supreme and Sovereign court, and has power not only to review, and reduce the decrees and sentences of inferior courts of admiralty, but likewise its own. There may be frequent occasions for the judge-admiral to review his own decrees; because defenders are often decreed, in terms of the libel, for not finding caution, *Judicio fisti, et judicatum solvi, i. e.* For compareance and performance of any act or decree that shall be pronounced. It was necessary that this court should have power to exact such caution; because frequently strangers are pursued before it, who, by withdrawing out of the kingdom, would render the jurisdiction ineffectual, unless such caution was found; but such caution can only be exacted in maritime causes; and, in default of the defender's finding caution, warrant for committing him to prison may be granted; but, in cases not maritime, such procedure is unlawful^c. The pursuer likewise, for the same reason, finds caution for the defender's expences, if, in the event, he shall be found intitled thereto; but such caution, in this case too, is only necessary in causes maritime.

3. The high court of admiralty declared a supreme and sovereign court; may review and reduce the decrees of inferior admiralty-courts, and its own decrees likewise; the caution found by parties in suit before that court.

^c Nov. 7.
1750. Richard Hill.

4. In causes maritime, this court has a privative jurisdiction, both in civil and criminal causes. The procedure in criminal causes is by way of inquest.

IN causes maritime, this court has a Peculiar or Privative jurisdiction in the first instance. All contracts, entered into upon the sea, or within flood-mark, *i. e.* between high and low-water mark, are within the admiral's civil jurisdiction. From the nature of the contract likewise, all actions on policies of insurance, or upon charter-parties between merchant and mariner, or against ship-masters for freight, seamens wages, and damages thro' breach of such charter-parties, are proper to that court. Crimes committed on the sea, or within the flood-mark, are likewise annexed to the admiral's jurisdiction, as piracies, and the like; with an exception of treason, or misprision of treason, which, if prosecuted here, is to be tried before the justice-court, or commissioners of oyer and terminer, tho' committed by Scotsmen upon the high-sea, and in any place out of the realm of Great Britain^a. The words of the act 1681 are, "That the high admiral hath the sole privilege and jurisdiction in all maritime and seafaring causes, foreign and domestic, whether civil or criminal." Wherefore, as to crimes not of a maritime nature, as murder, rape, a forcible marriage, &c. committed within the flood-mark, it would seem that the court of justiciary hath a concurrent jurisdiction with the admiral^b. In judging of crimes, this court is termed A court of justiciary of admiralty; because, in that respect, its jurisdiction is of the very same nature with that of the court of justiciary, and the method of procedure the same; the judge determines the relevancy, and remits the probation and trial of the fact to the knowledge of an inquest or jury; so that he is sole judge of the relevancy, and the jury of the probation, which is the case of the court of justiciary.

^a 7 Annæ,
c. 20.

^b Argum.
king's advo-
cate against
Gray, &c.
20 July
1751.

5. The court of session may suspend or reduce the decrees of this court in civil maritime causes; how such suspension pass.

THE lords of session may suspend or reduce the sentences of the high court of admiralty in civil causes, tho' maritime; but such bill of suspension must be past *In præsentia*, in time of session, or by three lords in time of vacance, three in vacation-time representing the whole lords. If a decree passes in absence before the admiral-court, in causes not maritime or mercantile, it is void; for it is only the consent of parties, by compearing, and thereby prorogating the jurisdiction, that founds it in those matters; and arrestments laid on in virtue of such decrees in absence, for such claims, or other diligences thereon, fall of course^c.

^c June 28.
1705. Ken-
nedy.

6. How far the judgments of the high court of admiralty subject to the review of the court of justiciary.

How far the sentences of the high court of admiralty, in criminal matters, are liable to the review of the court of justiciary, may be a question. The act 1681 declares The lord-admiral his majesty's justice-general upon the seas, and in all ports, creeks, and navigable rivers; and so it may seem, that since the justice-court came in place of the justice-general, and his deputies, the lord-admiral being declared justice-general within his territory, his jurisdiction committed to the high court of admiralty is co-ordinate with that of the court of justiciary: and it is said, that there is no instance in the books of adjournal since the act 1681, where the court of justiciary did review the decrees of the high court of admiralty, except one in the late judge's time, of which he much complained. It may seem, however, consequent, from the nature of the thing, that the justice-court, being the highest in matters of crimes, the sentences of all other courts, in such cases, may be subjected to their review: and that, as the judgments

ments of the court of admiralty, in civil matters, are under the review of the court of session, so they are in criminal to the court of justiciary, it not being declared more supreme in the one case than the other. Indeed the above statute prescribes the manner of passing suspensions of their sentences by the court of session, but does not mention the court of justiciary's suspending their sentences in criminal matters. But, in the first place, it appears above ^a, that it may have been considered the privilege of the court of session to pass bills of suspension of sentences of criminal judges, and in cases subject to trial by a jury, to remit the cause to the justiciary to be judged; so that the case mentioned in the act must relate to suspensions in criminal, as well as civil cases. 2dly, The omission to specify the court of justiciary's power of suspending the sentences of the high court of admiralty, will not infer that they had no such power; more especially, since the statute, in speaking of matters civil and criminal, prohibits advocations from the court of admiralty to the lords of session, "or any other judges whatsoever;" which last can only be meant of advocations in criminal causes to the court of justiciary; and the statute not having barred suspensions in such cases, these implicitly seem to be allowed.

^a Sup. tit. 7.

In mercantile matters the court of admiralty is competent, but hath no privative jurisdiction therein, nor therefore can use the peculiar form of proceeding, in exacting caution from the parties, as above. Thus the admiral hath a cumulative jurisdiction, in the first instance, with the court of session, between merchants and others beyond seas, and between them and persons in Scotland, arising from contracts, or otherwise relating to commerce; and actions upon bills of exchange are competent to the admiral court, in the same manner as to other courts of civil judicature ^b, as being deemed to be *in re mercatoria*.

^b July 19. 1706. Anderson.

7. The admiral's jurisdiction in mercantile matters.

^c B. 1. tit. 8. § 5.

I HAVE discoursed in another place of the admiral's jurisdiction as to wreck, ship or goods ^c. But it is farther to be considered, that persons or goods within his territory cannot be seized without his warrant, and that stray or waif goods can only be seized by him, and secured to the owners; as likewise goods derelinquished belong to the admiral and his deputies, in right of the king, in the same manner as such goods do to the sheriffs, when found within their counties ^d.

^d Feb. 19. 1751. lord Panmuir.

8. The admiral intitled to all waif and stray, or derelinquished goods.

ARRESTMENTS of goods within the admiral's jurisdiction can only be by his concurrence upon the letters, containing the warrant of arrestment; and, if the goods, belonging to persons in this country, are in a ship which is at sea, or abroad, it must be done at the mercat-cross of Edinburgh, pier and shore of Leith, in the hands of the shipmaster. The old form of arresting ships, was by actually disabling them to sail, which is now discontinued, and only an arrestment laid on; and the party depends on the penalty incurred, in case of breach of arrestment. However, hence it is, that a ship in foreign parts cannot be arrested at the mercat-cross of Edinburgh, pier and shore of Leith, but only in common form when in the harbour, and thereupon the same must be brought to a roup before the court

9. Arrestments, how proceeded in, of ships or goods therein.

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of admiralty. I shall have occasion to speak a little farther of arresting ships, and goods therein, and poinding such goods ^a.

^a Inf. tit. 41.
real execution.

10. This court may award damages, thro' groundless suspensions, and stops to execution of their decrees.

It is peculiar to this court, that the judge may, upon application of parties, modify and decree their damages thro' groundless suspensions, and stops of execution of his acts or decrees, besides the expences of plea, or costs of suit, which are to be modified by the lords of session, before whom such suspension is discusst^b. This power is reasonably given to the judge-admiral, before whom the suit was first commenced, and who can therefore best determine upon the loss and damages of the party grieved by the delay.

^b P. 1681.
c. 16.

11. The fines for breach of his arrestments, or enforcement of the executors of his precepts, go to the judge's use; these, and a proportion of the dues of court in place of a salary to the judge, which seems an hardship.

By the statute foresaid, It is declared to be the judge-admiral's privilege to punish all breakers of his arrestments, and deforcers of the executors of his precepts, and to apply the fines and amerciaments in that, and all other cases, to his own use; which is a singular privilege, since, in other cases, these offences infer escheat of moveables which belongs to the crown, with reservation of the creditors interest, and the prosecution is only before the court of session ^c. The fines, and other accidental advantages and dues of court, are by no means an adequate recompence, in place of a salary, to the judge of this honourable court: and however he, who lately filled the chair, and had done it for many years, got no other consideration than a proportion of those, for the great labour and pains he underwent in the discharge of that office, wherein he acquitted himself with great applause, and the present judge has no other; and, no doubt, if the matter were duly represented to the legislature, a suitable salary would be annexed to an office of so great importance.

^c P. 1581.
c. 118.

Observations on the Law of England, in relation to the Premises.

1. The statute in England touching shipwreck, is almost in the same words with our old act a century before. The requisite of a man, dog or cat coming alive, only put for example of the property.

I HAVE observed elsewhere^a, that, by statute in England, Where a man, a dog, or a cat escape alive out of the ship, such ship, or any thing within it, shall not be adjudged wreck. This I shall further explain here; if any sue for these goods, and prove that they were his, or perished in his keeping, within year and day of the seizure, they shall be restored to him without delay; and if none make such claim, they shall remain to the king, or to such other to whom the wreck belonged; and the offenders against the statute shall be awarded to prison, and make fine at the king's will, and shall yield damages also to the party aggrieved^b. This act is almost in the very same words with our old statute, made a century before^c. The statute in England is only declaratory of the common law; and the instances of a man, cat or dog, are only put for examples, whereby the ownership, and property of the goods, may be known, and therefore other evidence of it may be given^d. And the same construction is put upon our antient statute.

^a B. 1. tit. 8.
§ 4.

^b 13 Edw. I.
c. 4.
^c Stat. Alex.
II. c. 25.
anno 1214.

^d Coke 2.
inst. p. 166.

2. The statute is understood likewise of Jetfom, Flotsam and Lagan; the reason of

Tho' the statute speaks only of Wreck, which, in a proper sense, is only a ship or goods cast or left by the sea upon the shore, yet it extends to *Flotsam*, *Jetfom* and *Lagan*, which are not wreck, so long as they remain in or upon the sea, and pass not by grant of wreck, till they are cast upon the land; but the reason being the same, viz. the

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^a Id. 5. rep.
107. (Con-
stable's case)

the saving the property of the goods to the owner, it is within the meaning of the statute^a. Wreck was given to the crown upon the general maxim of the common law, That such goods, as no subject can claim the property of, do belong to the king by his prerogative, as treasure, trove, wreck, &c. which agrees as much to *Flotsam*, &c. as to wreck, properly so called.

both is a
maxim of the
common
law.

^b Id. 2. inst.
108.

THE year and day within which the owner must enter his claim to the goods, or lose them, is accounted from the seizure made of the same, as wreck; for the owner can then take best notice of it. And, if the goods are not seized by such as have right to wreck, but taken away by certain wrong-doers, persons not known, the owners may have action against them at any time for restitution^b.

3. Year and day is allowed to the owner to enter his claim; what if one that has no right seize the goods.

WRECK, by the law of England, is not within the jurisdiction of the admiral, and shall not be tried in the admiral-court, but at common law; for it is not wreck, till it is cast upon the shore or land, which must be within some county.

4. Wreck is not within the jurisdiction of the admiral.

^c Id. 5. rep.
107.

THE soil upon which the sea flows and ebbs, viz. between the high-water mark and the low-water mark, may be parcel of the manor of a subject; and yet, when the sea flows, the admiral shall have jurisdiction of every thing done upon the water, between the high-water mark and the low-water mark, (we call it the Flood-mark) in the ordinary and natural course of the sea; and notwithstanding, when the sea does ebb, the land may belong to a subject, and every thing done upon the land so ebbed, shall in England be tried at common law, for the same is then parcel of the county^c. Wherefore, below the low-water mark, the admiral has the sole and absolute jurisdiction, and between the low and high-water mark, the common law and the admiral have, *divisum imperium*, jurisdiction interchangeably, viz. the one upon the water, and the other upon the land. And where a subject has right to wreck by the king's grant or prescription, since a ship cannot be wrecked till cast upon land, which can only be between the high and low-water mark, it follows, that that space of ground is parcel of the party's manour, to whom the wreck belongs^d.

5. What the admiral's jurisdiction upon the ground between the low-water mark and high-water mark.

^d Ibid.

^e Braeton,
fol. 41.

^f Id. 5. rep.
108.

It is above observed, that *Flotsam*, *Jetfom* and *Lagan* is not wreck till cast upon the land; but notwithstanding whereof it belongs to the king, even while in or upon the sea, when the ship perishes, and the owner is not known. Of old it belonged to the first occupant^e; but now it falls to the king, in the same manner as wreck, and all that is provided as to wreck extends likewise to such goods; and therefore, if any person prove that they belonged to him, and perished in his keeping within year and day, he shall have them without delay^f. So that, as to the king and the owner there is no difference, but a subject may have the grant of wreck which will not carry *Jetfom*, &c.

6. Jetfom, Flotsam and Lagan belong to the king, while in the sea; this considered in the same manner as wreck.

It is a rule in the law of England, That the admiral's jurisdiction is confined to matters arising on the high sea; and therefore he cannot take cognizance of contracts, &c. made in any river, haven or creek

7. The admiral can only take cognizance of matters

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arising upon
the high sea,
but not as to
those on
creeks or ri-
vers.

creek within England; for those are triable by the common law. He hath jurisdiction when a ship or vessel is cast away at sea, over the goods that are *Flotsam*, *Jetson* or *Lagan*; but not if they are cast upon land, for such goods wrecked must be claimed by action at common law ^a.

^a Bac. new
abr. (courts)
632.

8. What ju-
risdiction
hath this
court as to
contracts.

THIS court hath no jurisdiction as to contracts made on land, whether in England or in foreign parts, nor of those made upon the sea, unless for a marine cause; but contracts, whereby the master hypothecates the ship, are within his cognizance ^b.

^b Vin. tit. 1
(courts)
p. 259, 268,
269.
^c 28 H. VIII.
c. 15.

9. How
crimes com-
mitted on
the sea, in
creeks, rivers
or havens,
triable.

As to crimes, it is ordained by statute ^c, That all felonies and robberies upon the sea, or any river, creek or haven, shall be tried by the king's commission, in such shires or places as shall be therein limited, in like form as if such offence had been committed on the land: and such commission, under the king's great seal, shall be directed to the admiral, or his deputies, and three or four substantial persons to be named by the chancellor, after the course of the common law.

10. The laws
by which all
maritime af-
fairs are re-
gulated.

ALL maritime affairs are regulated in England, chiefly by the civil law, the Rhodian law, the laws of Oleron, or by peculiar municipal laws, appropriated to certain towns or counties bordering upon the sea. Tho' the court of admiralty is no court of record, because their proceedings are according to the civil law, yet they may amerce a defendant for his default, and make execution for the same on his goods ^d.

^d Bac. ibid.
629.

11. The
judge-admi-
ral is to put in
execution the
decrees of
foreign ad-
miral-courts;
what if such
unjust sen-
tences be ex-
ecuted.

IT is peculiar to the admiralty, That if a decree is obtained in a foreign country, before the admiral there, against an Englishman who returns into England, and the judge sends his letters missive, *Ommes magistratus rogans*, requiring all magistrates to make execution of the decree, the judge of the admiralty in England may execute this judgment, by imprisonment of the party, and he shall not be delivered by the common law. For this is by the law of nations, that the justice of one nation shall be aiding to the justice of another nation, and the one shall execute the judgment of the other; and the law of England takes notice of this law, and the judge of the admiralty is the proper magistrate for that purpose, for he only hath execution of the civil law within England. And, if a ship is sold by virtue of a sentence of any court of admiralty, of a nation in amity with England, the sentence shall not be examined at common law. But, if the party is thereby injured, the only way to be relieved, is to petition the king, who will examine the case; and, if he finds cause of complaint, send to his ambassador residing there to apply for redress; and, on refusal, grant letters of mark and reprisal ^e.

^e Ibid.

T I T. XIII.

The Commissar-Court.

1. The ori-
gin of the
commissar-
court. The

THE jurisdiction of the commissars is likewise peculiar in consistorial cases. The Consistory was the place where the Roman emperor heard appeals brought before him ^a: but afterwards

^a Novel. 23.
c. 3.

the

*Cap. 3. ext.
de appell. in
6to.
b P. 1466.
c. 8.

*D. P. 1466.
c. 8.

*P. 1567.
c. 28.
P. 1581. c. 26.
P. 1592. c. 25.
These two
last acts are
of the un-
printed ones.

* Instructions
to the com-
missars, anno
1666.

the place where the bishop kept his court came under that name^a. Hence causes cognoscible, and matters to be transacted there, are termed Consistorial. The Commissars, otherwise termed Officials^b, were the commissioners or deputies appointed by the bishops for holding courts, and exercising their jurisdiction, and officiating for them in their consistories, within their respective dioceses. The clergy, of old, could only be convened before the bishop and his official^c; but this privilege fell by the reformation. The temporal rights and jurisdiction that belonged to bishops, accrued to the crown, by abolition of popery and episcopacy; and the king appoints the respective commissars, who have the same jurisdiction and authority that formerly they exercised, by commission from the bishops, with respect to matters cognoscible in the bishops courts, in virtue of a jurisdiction derived from the temporal powers. Tho' the episcopal rights, used or claimed by the bishops, as spiritual pre-eminencies inherent to the office, did fall therewith; yet other privileges and rights, which they enjoyed only by the grant of the sovereign, did not become extinct; but were renewed and re-established, particularly by the constitution of the commissars of Edinburgh, and appointment of other commissars, as formerly in use within the respective dioceses^d.

temporal jurisdiction of bishops continued to the commissars, in place of their officials.

THE power and jurisdiction of commissars, either concerns the confirmation of testaments, which generally is a matter of voluntary jurisdiction; or judicial proceedings in actions between parties. As to the first, the effects of persons dying intestate were intrusted to the bishops of the dioceses, it being presumed, that they would take most care of widows and orphans. They again appointed others to execute the testament, whom they confirmed executors for that effect. A confirmation is The commissar's warrant, giving one power to administer, or to receive the deceased's effects, and do every thing necessary for that purpose, in relation to the inventory confirmed. It is either the confirmation of a testament, *Testamentar, i. e.* of the executors named by the deceased in his testament; in which case there is no need of a decree dative to create them executors; for they are vested in the office by the nomination, if they please to accept of it: or of a Testament Dative, *i. e.* where the deceased made no testament, or the executor nominate does not insist to be confirmed*. In this last case the commissars, after an edict is served in one's favour, decree him executor-dative, and thereafter confirm him as such: the first executes the will of the deceased, the other the will of the law. It is proper here to take notice, that tho' the instructions 1666 mention, That the executor nominate shall, within three months after the party's death, apply for a confirmation; yet, such delay being inconvenient, the executor at law may be confirmed immediately after the days of the edict are expired, and will be decreed and confirmed; unless the executor nominate appear, and claim to be preferred.

2. The jurisdiction of commissars lies either in their confirming testaments, or in judicial proceedings. A confirmation is either of executors nominate, or of executors dative.

Of old, where no testament was made by a person deceased, the executors-dative enhanced the whole benefit to themselves, in prejudice of the nearest of kin, directly contrary to the primitive design of intrusting the deceased's effects to the care of the ordinary. This abuse

3. Of old, executors-dative carried off the whole effects of the intestate.

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This at first remedied in the case of minors dying intestate, and by custom extended to majors.

abuse was rectified, first, with respect to pupils, who could not make testaments; therefore, it is provided, that, in such case, their nearest of kin who succeed to them shall have their goods^a. This statute was, by custom, extended even to the case of majors, from the natural equity of the thing; and, to make it effectual, the commissars introduced the custom of obliging the executors confirmed, of all kinds, to find caution, acted in their books, to make the goods confirmed forthcoming to all parties having interest. Nor do we find, that the bishops or commissars, ever since that act, pretended to more than their Quot of the testament, except where their procurator-fiscal was confirmed, upon the refusal of all others having interest, and which was afterwards much limited^b.

^a P. 1540.
c. 120.

^b P. 1669.
c. 19.

4. The executor nominate carried of old the whole dead's part.

ANOTHER great abuse in confirmations was, That the executor nominate by a deceased, tho' not appointed universal legatary, kept to himself the whole dead's part: but the statute introduced for remedy thereof declares, That an executor nominate shall only have a third of the free dead's part^c. Of executors I have discoursed fully elsewhere^d.

^c P. 1617.
c. 14.
^d Sup. B. 3.
tit. 8.

5. The commissar, within whose bounds the deceased lived at the time of his death, and, in case he lived abroad, the commissars of Edinburgh competent to confirm his testament. What if the commissariot is vacant.

If the deceased had no fixed residence, or lived abroad, the commissars of Edinburgh can only confirm the testament, and that is all the prerogative competent to them in matters of confirmations; for they have no jurisdiction over the other commissars in that respect. Only it may be thought, that, during a vacancy in other commissariots, they may confirm wills there, the necessity of the thing seeming to require that remedy, as shall be remarked more at large afterwards. But the court of session, which, in our old statute, is called The King's Great Consistory^e, may name one to officiate in confirming testaments during such vacancy, upon a regular application from the persons concerned. If the deceased was abroad, about his lawful affairs, when he died, but not, *animo remanendi*, with intent to reside there, the commissar of the place where he dwelt is only competent for confirming his testament, and not the commissars of Edinburgh^f.

^e P. 1609.
c. 6.

^f P. 1426.
c. 88.

6. The judicial power of the commissars. The temporal jurisdiction which the bishops exercised in matters ecclesiastical.

THE judicial power of commissars is the Temporal jurisdiction, which the bishops had conferred on them by the sovereign, in matters that by the canon law were esteemed spiritual and ecclesiastical^g, and which they exercised by their commissars or officials. But the spiritual jurisdiction which lies in the government and discipline of the church, belongs to the office-bearers therein, and is exercised in their church-judicatories. As to which I shall add a particular title, after discussing the courts of the common law.

^g P. 1609.
c. 6.

7. What causes of old competent before commissars, or by the instructions 1666, and what at this day; how far deeds may be compe-

THE commissars, by the king's instructions^h, Have power to judge and decide in causes concerning benefices and tithes, cases of scandal, actions testamentary; and in all other matters wherein the oath of party is required, if the sum do not exceed 40 l. Scots; and in all other causes wherein the parties submit themselves to their jurisdiction. The competency of the jurisdiction of the commissars in civil actions, was much controverted of late. The judgments of the court of session had not been definite upon that head: wherefore, to clear the matter, the lords, some years ago, upon application from the commissars

^h Anno 1666.

* Anno 1737.

^b Dec. 1748.

commissars of Edinburgh, appointed an hearing in presence thereon ^a, but which did not take effect. And lately, after the new regulations of the sheriff-courts, their clerks applied to have the limits of the commissars jurisdiction ascertained, and, upon an hearing in presence pursuant thereto, the lords found ^b, That in ordinary actions in civil cases, above 40 l. Scots, the decree of the commissars was null; unless supported by the defenders prorogating their jurisdiction. At the same time they found, That a general consent in a bond or contract, to the registration of it In the books of any judge competent, should import a warrant to register it in the commissars books, if the creditor thought fit. Queen Mary's charter to the commissars of Edinburgh, the unprinted instructions 1563, and the constant usage, procured this judgment. And indeed the import of *Any judges books competent*, is every judge that can issue a decree of registration, or to whom the party might subject himself, by prorogating the jurisdiction, the intent being in order to summary diligence, in the most expeditious way. And, by the same judgment, the commissars were found competent to the authorising curators to minors, and to expediting tutorial and curatorial inventories.

tently registered in their books.

^c Fount. Feb. 10. 1693. Graham.

ACTIONS of cognition of debts are of a peculiar nature. By these the funeral charges, servants fees, and other the like debts due by persons deceased, are cognosced and ascertained; and tho' the nearest of kin are called, yet generally there is no conclusion of payment against them; for possibly the debtor has none to represent him, but died bankrupt. And since they frequently concern the obsequies, and so are considered as of spiritual cognizance, they have been usually carried on before the commissar-court of the bounds where the person died; and being generally in order to confirmation, are deemed proper to the commissars, and therefore advocacy from them was refused ^c. But such decrees are, however, subject to the review of the court of session by reduction. And I conceive, that where there is a conclusion of payment in the action of cognition, it is competent before the judge-ordinary; or, in matters of importance, before the court of session; for then it is in the same case as any other ordinary action for payment of accounts; and in practice they are frequently carried on before those courts.

8. The competency of the commissar-court to actions of cognition.

^d Fount. July 1. 1696. Cuthbert.

Tho' inferior judges are competent to adjudications upon decrees *cognitionis causa*, yet such adjudication, before the commissary-court, was found null by exception ^d, actions in civil cases of such kind having nothing consistorial in them. But all causes testamentary being expressly, by the instructions above mentioned, declared to belong to the jurisdiction of the commissars, therefore actions against executors, or vitious intromitters for debts or legacies, are duly brought before them; but as to other civil matters, only such as are within 40 l. Scots, or where the jurisdiction is prorogated, as above.

9. How far adjudications, on decrees cognitionis causa, or actions in other civil matters, competent before the commissars.

As to cases of bastardy; if, when one is offering to serve heir, bastardy is objected to him, the service is stopt, on the objector's finding caution to answer all damages that may incur thro' delay, in case he prevails not; and the case is remitted to the commissars to determine in the bastardy, which regularly ought to be discusst in six months;

10. Cases of bastardy, how far competent before the commissars.

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months^a. But if the service hath proceeded, the court of session is only competent to the reduction of it, on the head of bastardy, in the same manner as upon any other ground, and then the point of bastardy comes to be enquired into and determined by them^b. As likewise declarator of the escheat of bastardy, after the party's death, can only be carried on before the court of session, who are the only judges to declarators of escheat, or other such declarators.

^a Craig, l. 2. dieg. 18. § 9, 10.

^b July 23. 1630. Pit-lligo.

11. Actions in relation to benefices, or tithes, not peculiar to the commissars.

As to Benefices ; competitions concerning them became frequent after the reformation, between persons claiming the same on the gift of the sovereign, and others pretending thereto on the gift or provision of the pope, or the ordinary, *i. e.* the bishop of the diocese. And therefore the commissars were thought the proper judges to determine therein^c. But now, many of them having become rights of property to the lords and titulars of erection, the court of session, who are the proper judges in competition of heritable rights, are only competent to such questions. As to pursuits for tithes, or ministers stipends, they may be sued before any judge-ordinary, as well as the commissars ; and the settlements of ministers in parish-churches belong to the cognizance of church-judicatories.

^c P. 1567. c. 28.

12. How far matters of scandal, and where a civil cause is referred to oath of party, peculiar to the commissars. The case of executors, and their cautioners, enacting themselves to answer suits before the commissars.

MATTERS of scandal, or verbal injuries, have always been looked upon as consistorial. But if they are of a high consequence, on account of persons in power and dignity, against whom such offence is committed, they must be pursued before the court of justiciary, or other proper criminal court, for a condign punishment ; since commissars, in a question of injury, can only inflict a pecuniary fine, and subject the offender to recantation. And actions of damages, sustained by such defamation, in the matter of one's trade or occupation, are competent before other judges ordinary. All causes, in relation to matters wherein an oath was adhibited, or is to be interposed, by the canon law, belong to the ecclesiastical courts, as being of a religious concern ; but with us may be pursued before any judge-ordinary, even tho' within 40 *l.* as likewise may testamentary causes, as actions against executors, &c. The commissars indeed, for most part, oblige them and their cautioners to enact themselves, in their books, to answer, in all suits to be intended against them, before their court, in relation to the subject confirmed ; but that cannot prejudice the jurisdiction of other courts, or hinder persons to pursue such actions before any competent judge.

13. The commissars of Edinburgh competent to reduce decrees of inferior commissars, if suit is commenced within a year after such decrees, but not otherwise.

THE commissars of Edinburgh, as to judicial powers, have a more eminent jurisdiction than other commissars : they are for most part persons of knowledge in the laws, and very well deserve that trust : they are four in number, originally appointed by the archbishops, as after mentioned, but who are now created by the king, episcopacy being abolished. They have power to reduce the decrees of inferior commissars ; but, notwithstanding such reduction is intended, the decree may be put to execution : and, by an express article of the instructions to them, if it is not pursued within year and day, the party being major and within the kingdom, it cannot be afterwards insisted in^d ; but still it is subject to reduction before the court of session.

^d Instructions, article 16.

IT

It is likewise declared, by the statute 1609, That the commissars of Edinburgh have the only power to decide in all causes of divorce. They are the only judges in declarators of nullity of marriage for impotency, or upon any other lawful ground; and to questions of bastardy, where the same have connection with the lawfulness of marriage, or relation to adultery.

14. They are the only competent judges to actions of divorce, and to declarators of nullity of marriage.

THEIR proceedings, in all these matters, are still subject to the review of the court of session, during dependence of suit, by advocacy, so as to remit the same with Instructions, or Injunctions for regulating their procedure, as occasion requires; but not in order to a final decision before the lords themselves, in causes purely consistorial, they not being competent to actions of such kind, in the first instance. After decree is given by the commissars, remedy is competent before the lords of session, by suspension or reduction, who are declared his majesty's great consistory, as above^a. In advocations of causes not consistorial, the lords may advocate in order to a decision, or remit them with instructions, as they judge proper. Before the reformation, the course being to sue appeals from the bishops, and their officials, to the court of Rome, such as were depending when the reformation took place were to be discuss before the court of session, if regularly applied to within a limited time^b.

15. The proceedings before the commissars of Edinburgh liable to a review before the lords of session, by suspension or reduction. How far by way of advocacy.

^a P. 1609.
c. 6.

^b P. 1581.
c. 115. ratifying the act 1560.

THE commissary-jurisdiction was found fault with in the last age, as the remains of popery or (in the times of presbytery) as depending upon the abolished hierarchy, and that therefore the same ought to be taken away and annexed to other jurisdictions. But the learned Sir John Nisbet, who had long officiated worthily as a commissar of Edinburgh, supports their jurisdiction, and endeavours to shew that no other judges can, with so much conveniency to the subjects, supply that office, which chiefly concerns matrimonial and testamentary causes; and he answers the objections that were made against these courts^c, some whereof there is no place for at present; particularly the great expence of confirmation, by exaction of the Quots, which are taken away by statute, as above.

16. The usefulness of commissar-courts maintained by lord Dirleton.

^c Dirleton.
(doubts) tit. consistories.

ON this occasion the learned author contends, that the above matters, which are the province of the commissars, were not of ecclesiastical cognizance, and so did not depend on the bishops. And there is no doubt but that, among the Romans, there was a peculiar Prætor for testamentary causes^d, and ecclesiastics were prohibited to judge in them^e. And it appears, from the titles in the Digests and Code, *De repudiis et divortis*, that divorces were extrajudicially made, and the consequents of them, as to the restitution of the *Dos*, and *Donatio propter nuptias*, were cognosced by the Prætor, or other civil judges. But whatever was the case of the old Romans, it is certain that the jurisdiction of the commissars, in the above respect, is succedaneous to the temporal jurisdiction exercised by the bishops and their officials; and the form of testaments, constitution of executors, and confirmation of testaments, are founded in the canon law^f; and those, and matrimonial causes, were always deemed of a spiritual cognizance, and were of ancient reception with us^g. And it is surprising that lord Dirleton should be at pains to shew, that the matters proper to the

17. Whether are the commissar-courts of a civil or ecclesiastical original.

^d L. 2. § 32.
ff. de orig. juris, l. 92.
ff. de condit. et dem.
^e L. 41. c. de episcop. et cler.

^f Cap. 10, 11. extra de testamentis.
^g Reg. maj. l. 2. c. 51. stat. Will. c. 22. § 2.

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commissars are of a temporal cognizance, in order to establish the necessity of their courts; for it rather weakens his argument, since, at that rate, why should they not be left to the temporal judges, and not reserved as consistorial to the commissars?

18. The institution of the commissars of Edinburgh; their particular jurisdiction in judicial causes.

THE commissars of Edinburgh owe their being to the reformation; for, after the pope's authority was abolished by the act of the parliament 1560, which, not being formal, was ratified by a subsequent parliament^a, there happened to be an interruption of the episcopal jurisdiction, and their officials ceased to cognosce in consistorial causes. Wherefore queen Mary, upon a recital to the above purpose, in their place constituted four learned persons commissars of Edinburgh, and this act was tacitly approved by a statute in the same parliament^b, and expressly confirmed by an unprinted act of another parliament^c. This grant and act is, in effect, a charter of the privileges of the commissars of Edinburgh, and it will be proper to take farther notice of the same. It specially sets down the particular bounds of their peculiar commissariat, *viz.* the shires of Edinburgh, Haddington, Peebles, Lithgow and Stirling; within which they were to determine, in all causes concerning tithes, testaments, scandals, and all other causes that used to be judged in the consistorial courts.

^a P. 1567.
c. 2, 3.

^b Act of council, Feb. 8. 1563. approved P. 1567. c. 28.
^c P. 1592. c. 25. of the unprinted acts.

19. Their universal jurisdiction in some matters

AND next, they have an universal jurisdiction over all Scotland as to causes matrimonial, divorces, and cases of bastardy; and a power of reviewing, by appeal or reduction, all the sentences of inferior commissars; and of registering in their books all contracts and obligations proceeding upon the consent of parties.

20. Their jurisdiction in confirmation of testaments. How far are they intitled to confirm testaments of persons dying within other commissariots during the vacancy.

As to confirmation of testaments, the commissars of Edinburgh not only had (as they presently have) the sole power of confirming all testaments of persons dying within their own territory; but likewise had, by this act, the privilege of confirming the testaments of such as died within other commissariots, where the dead's part exceeded 50 *l.* Scots; and, by the instructions relative to this grant, they have an exclusive privilege in that respect. It is true, this does not now take place, being past from in favour of the inferior commissars, as after mentioned; but where their interest is not concerned, *viz.* during the vacancy of any inferior commissariat, the confirmation of testaments is claimed by the commissars of Edinburgh. And accordingly, in numerous instances, they are said to have confirmed the testaments of persons dying within other commissariots during the vacancy. The lords of session may indeed appoint an interim-commissar to officiate, if the parties concerned apply for the same, as above; but that cannot invalidate the testaments confirmed in the mean time by the commissars of Edinburgh.

21. The case of the commissars of Edinburgh after the restitution of episcopacy, and on its abolition.

THE bishops, on the restitution or redintegration of their estate, were restored to their former commissariots^d; but the commissars of Edinburgh were continued with this variation, that in place of their being appointed by the king, according to their original institution, two of them were named by the archbishop of St. Andrews, and two by the archbishop of Glasgow, who, however, had their own peculiar

^d P. 1609. c. 6.

* Mackenzie
on P. 1609.
c. 6.

culiar commissars. This seems to evince, that the supereminent power which the two archbishops had, by their archiepiscopal jurisdiction in temporal matters over all the kingdom, was communicated to the commissars of Edinburgh by the original institution; and for this reason their authority is so extensive, as is above related, tho' thereafter all the four were named by the archbishop of St. Andrews as being metropolitan of All Scotland^a. The establishment and continuance of the commissars of Edinburgh occasioned divers questions and disputes between them, and the archbishops and bishops, touching the quots due to them at confirming the great testaments; which were partly settled by decree-arbitral, and partly by decisions of the court of session, largely taken notice of by Sir George Mackenzie, in his observations on the act last above referred to, whom the curious reader may consult; and now the commissars of Edinburgh are named by the king, according to their original state.

T I T. XIV.

The Sheriff, or Stewart-Court.

ALL feudal jurisdiction is cumulative, as I formerly observed; so that the superior, as he retains the *Dominium directum*, or the feigniory, has a concurrent jurisdiction over the fee. Wherefore, notwithstanding the jurisdictions of inheritance granted by the king, of baronies, or other higher jurisdictions, his majesty had the same reserved jurisdiction, as other superiors in such cases, and might exercise it by persons commissioned by him. Thus sheriffs were appointed by the king, when those having the higher feudal jurisdiction misused it, as our historians relate: hence sheriffs are called *Vice-comites*, as supplying the vice or place of the *Comites*, or feudal lords. The several territories of their jurisdiction are called Shires or Sheriffdoms, *i. e.* Divisions, from an old Saxon word, which signifies to Cut or Divide. They are otherwise termed Counties, *Comitatus*, as being the bounds within which the *Comites*, or Earls and Lords formerly exercised their jurisdiction.

1. The original of shires and counties; they proceeded from the king's cumulative jurisdiction as superior.

^a Reg. maj.
lib. 1. c. 3.
l. 3. c. 21. 22.

^b P. 1425.
c. 65.

^c P. 1537.
c. 36, &c.

ANTIENLY the sheriff of the county had power to review and reduce the decrees of baron-courts within his territory, and to advocate causes from them, in case of injustice or wrong done by these courts^a. This, I conceive, proceeded from the original intent of the institution of sheriffs who were appointed by the king, in respect that the barons, and other feudal lords, failed in the administration of justice, and to correct the abuses committed by them. But thereafter, upon appointment of the antient court of the lords of session, who were a committee of parliament^b, the sheriffs ceased to have such power. And more especially, upon institution of the college of justice, as now modelled^c; the power of reviewing the decrees or proceedings of all inferior courts in civil actions came to be vested in the court of session; as in criminal causes in the court of justiciary; and which is farther ascertained by the regulations 1672.

2. Sheriffs antiently had power to reverse the proceedings before baron-courts; this afterwards altered.

THE sheriff cannot impose any burthens or duties upon the heritors or inhabitants of the shire. Nor can the heritors themselves do it, even

3. The sheriff, even with consent of the major

city of the heritors of a shire, cannot impose burthens upon such as dissent.

even with the sheriff's concurrence, being no corporation. The dissent of any one of the heritors will save him from any such imposition; for, in matters of privilege and property, none can be subjected by the deed of others who have no such power, the rule laid down in the law, in such matters, being, that *Potior est conditio prohibentis*^a. This rule holds as to subjects common to many, and much more in the case of burthening one's own property. But the heritors of a parish are impowered by law to rate or dissent themselves for repairing the church and minister's manse, or for maintenance of the poor; and the major part will carry it, they being so far considered as a community, in virtue of the statutes impowering them.

^a L. 28. ff. com. div.

4. Stewartries, of the same nature with shires; the occasion of their name.

THERE are some stewartries with us, that are of the same nature with sheriffdoms, and only differ in the name. Which possibly they got, because the whole bounds of the stewartries belonged to the king, and his majesty at first appointed the lord high-stewart judge-ordinary thereof; and thereafter constituted stewarts with the same powers as sheriffs; but they retained still their antient name. Those are the stewartries of Kirkcudbright and Orkney, which send members to the parliament, and the stewarts are the same in them that sheriffs are in shires.

5. The cumulative jurisdiction declared to belong to the king by the act 1681, now repealed; it was a stretch of the prerogative beyond its just bounds.

THE cumulative jurisdiction declared to belong to the king, by special statute^b, now repealed^c, was stretching the prerogative farther than the nature of the thing, and the genius of our government would admit; for thereby the king might evacuate the jurisdictions of all judges of the kingdom when he pleased, by special commissions to other persons to cognosce and determine in the matters within their cognizance. And sheriffs and stewarts-courts, by immemorial usage and various statutes, ascertaining their jurisdictions, became a part of our constitution; and therefore must be continued inviolate, even tho' the same were not secured by an article of the union, as however they are^d.

^b P. 1681.
^c 18.
^c P. 1690.
^c 28.

^d Art. 19.

6. Before the late act many sheriffships were heritable; now all granted by the king during pleasure. The sheriff-deputes must be advocates of three years standing; sentence-money taken away, and they have a salary, and are answerable for their substitutes: the sheriff-deputes the only judges.

MANY sheriffships were antiently offices of inheritance, and continued to be such before the late act. But now sheriffs and stewarts, and sheriff and stewart-deputes are appointed by the king^e. Sheriffs of old behoved to appoint deutes, who could Hold the law to the commons, and were answerable for the administration of their deutes, and the sheriff-deputes are answerable for their substitutes: and as deutes formerly might judge in the causes belonging to the principals^f, so I conceive the sheriff-substitutes, at present, may, in those belonging to the deutes. The sheriffs were likewise answerable for the malversation of their clerks in office^g; but that can only be understood to have taken place, when the clerks were of their own nomination, which of old was the case^h, whereas now they have their commissions from the king. Sheriffs ought to have sufficient of their own, that they may be capable to satisfy the damage of the parties wronged by them in the execution of their officeⁱ; and for the same reason the sheriff-deputes, who have the sole power of judging, exclusive of the sheriffs-principal, ought to have such qualification. If a sheriff, or other judge, refuse to administer the law, he is subjected to a temporary suspension from his office, and the expences

^e 20 Geo. II.

^f P. 1540.
^c 73.
P. 1579.
^c 84.
^g P. 1587.
^c 72.
^h P. 1592.
^c 126.

ⁱ P. 1424.
^c 6.

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^a P. 1469.
c. 26.

^b P. 1487.

c. 103.

^c Sup. tit. 2.

pences of the party, as he is liable to a total forfeiture of his office, the expences of the party aggrieved, and an arbitrary punishment, if he give partial judgment ^a. And, by our old law, the sheriff was to thole an affize, *i. e.* undergo a trial, in relation to his proceeding on the last day of the Eyer or circuit-court ^b. I have spoken a little on this head elsewhere ^c.

^d P. 1540.
c. 71. quon.
att. c. 33.

OF old sheriffs, as the king's ordinary Lieutenants of the county, were bound to hold three head-courts in the year, in order to the due administration of justice. And all barons and freeholders that owed suit and presence were to be there personally; and those who owed suit only behoved to send their proxies, honest and qualified men, that might pass upon affizes, and assist the sheriffs in the exercise of their office, and the absents were to be amerced ^d. Hence 'tis plain, that trials were carried on at those courts, and that causes of all kinds were heard and determined therein.

7. Sheriffs antiently bound to hold yearly three head-courts, in which all causes were determined.

^e 20 Geo. II.

BUT the present usage is only to hold one head-court in the year, *viz.* at Michaelmas, or about that term, on a fixed day. And, by the late statute, no person can be fined for not attending at head-courts, or for not sending a procurator to answer for him: but the freeholders are to meet at the Michaelmas-head-court, and to act and proceed therein as formerly. And all vassals of the king, or any other subject-superior, must attend at any court to which they are subject, being specially summoned for that effect to serve as jurymen, or for any other lawful purpose ^e.

8. Thereafter one head-court used to be holden, *viz.* at or about Michaelmas; who bound to attend at it.

^f P. 1681.
c. 21.

FREEHOLDERS, at their Michaelmas-head-court, of old, regularly elected members of parliament for the county ^f. And, at present, they adjust the rolls of electors, in manner directed by the above act. And nothing hinders them to order other matters concerning the public interest of the county, as to make regulations touching the poor, adjusting weights and measures to the standard, or the like. Tho' they were commonly in use only to meet to answer their suits; and, if they were absent, the old statute was too much kept in observance, by fining them, which is now happily remedied.

9. The proper business of the freeholders at the Michaelmas-head-court, of old, and at present. Sentence-money now taken away.

^g P. 1491.
c. 30.
P. 1503.
c. 66.
^h Novel. 82.
c. 9.

SHERIFFS were intitled to sentence-money, or a consideration to the judge, conform to the sum decreed; which was limited, of old, to a sum equal to the 20th part of the sum contained in the decree ^g. This was like the *Sportula*, allowed inferior judges by the civil law ^h; and was expedient, because they had no salaries from the public. But now sentence-money is taken away, and they have a salary from the government by the said act, at least the sheriff-deputes have; and the sheriffs-principal are disabled from judging.

THE sheriffs jurisdiction is both Civil and Criminal. In civil cases it is most extensive, having no limitation, unless where causes are peculiar to other courts. Small causes, *i. e.* those within 200 merks, and by the late act 12 *l.* Sterling, regularly ought to be pursued before them in the first instance. All brieves out of the chancery, for serving heirs in special, are directed to them; unless the lords of session, upon application by parties concerned, ordain them to be directed

10. The sheriff's jurisdiction in civil cases without limitation, except as to causes peculiar to other jurisdictions. The

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case of small
sums and
Brieves.

rected to others commissioned for that purpose, as they do, in cases of difficulty, to their own macers.

11. A brieve,
it is either
retourable or
not retour-
able; this last
called a
Pleadable
Brieve; the
retourable
brieves.

A BRIEVE is a Writ issuing out of the chancery, in the king's name, at the instance of the raiser of it, directed to the judge-ordinary, commanding him to try, by an inquest or jury, certain matters of fact therein-mentioned. And, according to the nature of the respective brieves, either to return what is found by the verdict, with the brieve and executions thereof, to the chancery: whereupon there is issued out of the chancery an extract, commonly called the Retour, which is in place of a sentence, and these are called Retourable Brieves. Or enjoining the judge to determine the same himself, upon advising the verdict found by the inquest, and such brieves are termed Unretourable or Pleadable Brieves.

BRIEVES were the summonses of old in all cases civil, in order to commence suits or actions before the High-justiciar, and the judges ordinary^a; and the matters of fact were tried by inquests or juries, as is the case of those that remain at this day; for most of them have gone into disuse. But seven brieves are still in use; and regularly the matters accomplished by them cannot otherwise be done, according to our method of proceedings. Three of them are retourable, or returnable to the chancery, termed Brieves of Service. And four of them are not returnable; which, as other summonses, are only the foundations of suits before the judge-ordinary, and are called Brieves of Plea, or Brieves Pleadable, as just said. The first of the retourable brieves is for serving an heir to his ancestor, called a Brieve of *Mort-ancestrie*, or *De morte antecessoris*: the heads of it vary, according to the different character under which the taker out of the brieve claims to be heir. I have already fully spoken of this brieve^b. The second retourable brieve, is for serving one tutor-of-law to a pupil, which must be his nearest agnat, of 25 years of age, that is fit for administration, and able to find caution, to be answerable to the pupil for the same^c. The third is the brieve of Idiocy, for serving the nearest agnat tutor to an idiot^d; which comprehends all that are naturally incapable to manage their own affairs, as persons dumb and deaf, &c. If the heads of those two brieves last mentioned are duly answered, they are retoured or returned to the chancery, and there will be issued thereon a writ in the king's name, containing a nomination of the tutor, conform to the service. The verdict is signed by the chancellor of the inquest, and as many more of them as please, and returned to the chancery by the sheriff, or other judge before whom the service is expedited. Of both these I have likewise treated in the proper place^e. There was of old a retour of the quinquennial possession of forfeited persons, of lands possessed by them, as heritors without interruption, five years before their forfeiture, which gave an absolute right of such lands to the crown; but this is now abrogated^f.

^a P. 1471.
c. 41. quon.
attach. 49.

^b B. 3. tit. 5.

^c P. 1474.
c. 4.
^d P. 1585.
c. 18.

^e B. 1. tit. 7.

^f P. 1584. c. 2.
P. 1690. c. 33.

12. The
pleadable
brieves.

THE four brieves, not returnable to the chancery, are termed Pleadable Brieves; because they are in place of summonses before the judge-ordinary, and admit of pleadings before him, as any other action; and after the verdict is returned into court, he interposes his
OWN

own decree. Those must be executed against the party having interest; whereas, the retourable brieves are only executed at the mercat-cross of the head-burgh of the shire, against All and Sundry; because the obtainers of those are insisting on their own right, which they do not know if any other will controvert; whereas, in pleadable brieves, the matter to be in issue is always supposed to be, and sometimes is the subject of controversy. Those pleadable brieves are, First, the brieve of Terce, for serving the widow to a third of all the lands, tithes and annualrents, wherein her husband died infest within the jurisdiction. After the verdict is returned to the judge, he, according thereto, adjudges the liferent of the third of the subject to her as her dower. But he may likewise Ken her to her terce, which is by dividing the lands between her and the heir, according to the due proportions; whereas she has, by the service, only a right *pro indiviso* to the third of the rent. It proceeds upon Holden and Reputed, viz. That the claimer was commonly reputed lawful wife to the deceased, and that he died duly vested as heritable proprietor of the lands or other subjects. I have discoursed fully of the widow's terce in another place^a. The second is the brieve of Division, for dividing lands belonging, *pro indiviso*, to joint proprietors, whether heirs-portioners or co-adjudgers, or others. Of this I have likewise treated in the proper place^b. The third is the brieve of Lining, Which is for cognoscing the proper bounds and limits of tenements within burgh, by the line, and that the same be possessed accordingly in time coming. For this purpose, by the borow-laws, the town-council were to choose liners, who were to be sworn, That they should faithfully line the lands within the burgh, in length and breadth, according to their true meets, or meiths and marches^c. This brieve is directed to the magistrates of the borow where the tenements lie, who must call an inquest to see the lands meithed, or measured by the liners; who must return a verdict thereon; upon advising of which, the magistrates give their decree, ordering the same to be possessed accordingly^d; but this brieve is not much used, because differences about the limits of burgal tenements properly belong to the jurisdiction of the dean of guild-court. The fourth unretourable brieve is that of Perambulation, For cognoscing and determining the marches of controverted neighbouring grounds in the country. The inquest here must consist of landed-men, because they are cognoscing upon rights of property^e. These matters behoved to be tried by an inquest of good men of the country, who were heritors: for such persons in the neighbourhood were presumed to know best the several circumstances necessary to be ascertained, in order to an issue therein. If the jury or inquest is equally divided in their votes, the chancellor, i.e. the presiding member may be compelled, by fine or imprisonment, to give the casting or decisive vote^f. I have spoken farther elsewhere of this brieve^g.

^aB. 2. tit. 6.
§ 2.

^bB. 1. tit. 8.
§ 36.

^cLeg. burg.
c. 102.

^dIbid. c. 123.

^eP. 1579.
c. 79.

^fBalfour
(brieves)
March 5.
1554. Duni-
pace.

^gB. 1. tit. 10.
sect. 9.

^hP. 1617.
c. 13.

ALL those retours and sentences, tho' proceeding on brieves, are liable to reduction before the lords of session, any time within 40 years of their date; only, as to reduction of services of heirs, the action is limited to 20 years^h. In reduction of retours, it would seem, that not only the party, but likewise the members of inquest ought to be called, that they may give account on what documents or evidence

13. The retours or sentences proceeding upon these brieves, liable to review before the court of session.

dence they proceeded. But as to the decrees or sentences on the pleadable brieves, only the party interested need to be called, as in other decrees before the judge-ordinary. Procedure on brieves is likewise subject to the review of the court of session by advocacy, who, in such case, remit the cause with or without instructions, as the case requires; for they cannot exercise their judicial power by intervention of juries, and so cannot judge in brieves in the first instance.

14. The form of procedure before the sheriff-courts, and other inferior courts, briefly described; formerly various, but now uniform as to proceedings before sheriff-courts.

ALL other processes in civil matters, before sheriffs, or other inferior courts, are commenced by Precepts, in the name of the principal judge of each respective court; and are regulated, as to the material parts of the procedure, by the same form as before the lords of session; and the variations in smaller matters must be known from the usage of each court, which will be sustained, unless contrary to statutes in force, or the general rules ascertained by the uniform decisions of the lords in such case. Thus, in some courts, one must be cited *pro confesso*, before he can be holden as confest; and in others, a personal citation on the summons or precept, with such certification, "That, in case he compear not, he shall be held as confest," is sufficient. But without a personal citation, and thereon holding the defender as confest, the decree in absence is always found null by the lords, in a suspension or reduction of the same; but whether a citation for that purpose is necessary, depends on the custom of the court. The law has prescribed the same form of executing summonses, or precepts, in actions before inferior courts, as before the court of session^a. They behaved, of old, regularly to determine first the relevancy, and then allow the parties respectively to prove in terms thereof; but now the lords sustain acts, before answer, by inferior judges: because it is sometimes necessary, for the expedition of justice, to have the proof of the facts laid before the judge, previous to fixing the relevancy. The sheriff-deputes of late have jointly formed certain regulations, to be uniformly observed in their proceedings, whereby justice may be administered in due course.

^a P. 1540.
c. 74. and 75.

15. The criminal jurisdiction of sheriffs; exercised, either by way of ordinary action in petty delinquencies, or in a solemn manner by an inquest; how fines recoverable.

THE criminal jurisdiction of the sheriff is either exercised by way of complaint and ordinary action; or, in a solemn manner, by an inquest or jury: the first takes place in delicts, or petty crimes, where the whole procedure is as in civil actions, in order to inflict a fine, scourging or imprisonment on the offender, and to assess damage to the party aggrieved; and such as do not infer infamy, may be proved by oath of party. The defender may be ordered to prison till payment of a fine, but not for damages awarded to the party; for the fine is a punishment, which, for the good of the public, must be exacted; whereas the damage is a civil interest, and the concern only of the private party, recoverable in due course of law.

16. Such action is either at the instance of the procurator-fiscal solely, or of the private party, with his concurrence; the

IN those petty delinquencies, the prosecution is either carried on by way of complaint, at the instance of the procurator-fiscal of court alone, for a fine, or other suitable punishment; or of the private party injured, for damage likewise to him, with concurrence of the fiscal for the interest of the public. And, in competition, That at the suit of the private party will be preferred; since the procurator-fiscal ought only to take up the prosecution, where the person lesed does not insist, that crimes may not remain unpunished^b. In criminal prosecutions, either

^b P. 1436.
c. 140.

either by way of complaint or ordinary action, decrees given for fines in absence of the party are null ; for he could only be amerced for contempt or contumacy, and a warrant granted to apprehend him, in order to a cognition of the cause. And this rule holds as to all procedure upon crimes or offences; only the justices of peace, by special statutes, in certain matters of fraud relating to the revenue, may pass sentence upon the same in absence of the defender.

first only competent where the other fails; what if the defender be absent in such case.

THE solemn manner of trial, by inquest or assize, is used in crimes of an high nature, inferring corporal punishment, *i. e.* loss of life or demembration. And in those the procedure is in the same manner as before the court of justiciary, the procurator-fiscal of court supplying the place of his majesty's advocate.

17. The solemn manner of procedure in crimes of an high nature, by way of inquest.

WHERE the procedure before the sheriff is by way of complaint or ordinary action, the lords of session may review their judgments, by advocacy or suspension. But in advocations they remit the cause with instructions, or without, as they see just, where the case merits a punishment to which they are not competent; but otherwise they may advocate it to themselves. In the solemn trials by inquest, the court of justiciary review their judgments by advocacy or suspension, tho', even in such case, it is thought, by some eminent lawyers, to be the privilege of the court of session to pass such bills of advocacy or suspension, and to remit the same to the justiciary to be discussed, as I have set forth above^a. If the inquest has given their verdict, the party cannot be anew tried: however, the lords, upon an advocacy, may give instructions as to the punishment; or mitigate the sentence, in a suspension or reduction of their decree. This may now be competently done in cases importing a capital or corporal punishment, where execution is stayed for 30, on the South-side of Forth, and 40 Days on the North of it, by the late statute^b. And in such cases, the lords of justiciary may review the interlocutors upon the relevancy, and the sentence in consequence of the verdict of the assize, but cannot the verdict itself; for, in criminal cases, the verdict of the jury is irreversible. And assizes of error are declared a grievance, by the convention of estates 1689^c, and have been ever since disused.

18. In ordinary actions for petty delinquencies, their proceedings may be reviewed by the court of session; and in trials by inquest, by the justiciary.

^a Sup. tit. 7.

^b 11 Geo. I. c. 25.

^c Art. 18.

^d De verb. sign. verbo (sheriff).

^e 20 Geo. II.

THE powers of sheriffs, and the duty of their office, are largely treated of by Skeen^d, to which I refer, and to the several statutes cited by him, as the case stood in his days. The sum of the whole is above taken notice of: and which are but little varied by the late regulations. The sheriffs principal cannot act in a judicial capacity, the whole judiciary power being lodged in the sheriff-deputes^e.

19. The power and duty of sheriffs.

IT is incumbent on all sheriffs and stewarts to strike the fiars, (called the Sheriff-Fiars) *i. e.* To ascertain the prices that all sorts of grain shall be holden as estimated at in their counties, where a party liable in a quantity of grain or victual fails in delivering or tendering it in due time. The manner how this is to be done is established by act of federunt^f. It enjoins each sheriff or stewart, between the 4th and 20th of February yearly, to summon before them a competent number of persons within the shire, of skill and experience in these

20. The fiars; how the same are struck, and the use of them.

^f Decern. 21. 1723.

matters, and of them to chuse 15 men, of whom eight at least are to be landed-men; as likewise to cite proper persons witnesses touching the premises. And this jury, either on their own knowledge, or the evidence laid before them, shall return their verdict as to the fiar-prices for the year preceeding; to which the judge interposes his authority, and this must be recorded in his books. This being a judicial act, it is now the province of the sheriff or steward-deputes, or their substitutes. The party lesed, thro' default of those liable to him for grain, may either content himself with the fiar-prices, which are commonly struck of the middle kind, neither at the highest or lowest rates; or insist for the highest prices, which he will be found intitled to, unless the defenders had a probable ground for their deficiency.

21. The judicative power of sheriff-deputes not extended by the act abolishing regalities, &c. but their territory as to the same enlarged.

THE judicative power of sheriff-deputes is not enlarged by the act abolishing the heritable jurisdiction of lords of regality, their baillies and stewarts, but their territory is, in many places, much extended; for they must exercise the ordinary jurisdiction, which was competent to those abolished ones within their bounds, as much as in other parts of the county, in the same manner as if the regalities, baileries and stewartries, had never been erected. Wherefore the sheriff-deputes cannot judge in those crimes called the Four Pleas of the crown, viz. Murder, Robbery, Ravishing of Women, and Fire-raising, within the bounds of the abolished regalities, more than they could before, within the other parts of the shire; since that was an extraordinary jurisdiction specially granted for most part to lords of regality, in the erection of their lands into that dignity, which now solely belongs to the court of justiciary. But as to murder, the sheriff is judge to it, when the offender is taken in the act, or, as we call it, *Red-hand*, and he must judge him within three suns or days^a; but must respite the execution, as the statute above-quoted directs^b.

^a P. 1426.
c. 89.
^b 11 Geo. I.
c. 25.

22. Advocates of three years standing at least, can only be appointed sheriff-deputes; persons, in order to be admitted advocates, must undergo a trial on both the civil and Scots law, and be 20 years of age before he enter upon the first trial.

As at present sheriff-deputes have a great trust committed to them by the legislature, so care hath been taken that they shall be persons well qualified for the office. And therefore the statute^c provides, that they shall be advocates of at least three years standing: such, if they have employed their time to good purpose, may be sufficiently accomplished to acquit themselves worthily. And in order thereto there is a wholesome regulation since made by the court of session, That none shall offer himself to an examination upon the civil law, in order to the office of an advocate, till he is 20 years of age, and that thereafter he shall undergo a trial upon the law of Scotland, at the distance of at least one year from the preceeding trial on the civil law; so that before he can be admitted an advocate, he must be found qualified in both laws. And, for accomplishing students of the law, there is a learned professor of the civil law, and another of the Scots, established by the government for teaching the same: for tho' the civil law is the principal foundation of the law of Scotland, yet as the practice in that law depends very much, in divers particulars, upon peculiar principles and forms, it is reasonable that one should have knowledge of those principles before he enter advocate. And that he may be further expert in the same, and in the forms of procedure, three years practice is required, in order that he may be fully qualified for the office, if he

^c 20 Geo. II.

he shall be thereafter called to be sole judge of a county, at least the judge-ordinary; since very small causes only can be cognosed in baron-courts.

WHAT I have already discoursed of, concerns, for most part, the judicial power of sheriff-deputes. And I shall only add on that head, That the sheriff-depute is the principal conservator of the peace of his county. And, therefore, it is his duty to take proper methods to prevent all abuses therein, and to exact surety of the peace or good behaviour from any person, where occasion requires, in the same manner as justices of peace may; for, as he has cognition in breaches of the peace, when committed, it cannot be doubted but he may exact such security, in order to prevent them.

23. The sheriff-depute is the principal conservator of the peace of the shire.

BUT the office of a sheriff-depute is likewise Ministerial; and in that respect he is said to be bound to execute all decrees, and particularly to put poindings and captions to execution^a. But generally messengers, as Sheriffs in that part, *i. e.* authorised to act in the stead of sheriffs, by the will of the letters, are employed in the servile part of executing such letters: however sheriff-deputes, on this ground, are subjected to the payment of the debt, if, being duly required by the messenger, they do not assist him in making effectual the execution in the above cases, as I have more fully shown elsewhere^b. But sheriffs, with us, not having the charge of prisons, are not liable for the escape of persons thereout. And only the magistrates, and the Goaler put in by them to keep their prison, are subjected, in case of such escape, thro' their fault, or insufficiency of the prison, as I have likewise taken notice in the above quoted place.

24. The ministerial office of sheriff-deputes, as to executing poindings and captions.

IT is a momentuous part of the sheriff's ministerial office to serve writs directed to him, in order to the election of members of parliament for counties and borows, concerning which I have treated in the proper place^c. And this, not being a matter judicial, is within the province of the sheriff-principal in the first place; but, in default of him, the sheriff-depute is bound to do it; or the sheriff-principal may wave it, and leave the charge of the same to the depute, as he thinks proper.

25. The duty of the sheriff to serve writs, in order to the election of members of parliament.

THE court of exchequer, with us, being established after the form of the court of exchequer in England, and directed and empowered to award and issue all such writs, precepts, process and methods of proceedings, as are done and practised in the like cases, in the court of exchequer in England, the sheriff-deputes, to whom such writs or process are directed, must, by themselves or their substitutes, execute the same. And the barons may impose on the sheriff-depute, or his substitute, to whom the execution of such writs or process shall appertain, such fines, amerciaments and penalties, in case of not due executing and returning the same, as to the said court shall seem fit and reasonable^d; and the procedure in such executions and return is described in the following observations.

26. Sheriff-deputes, by themselves or substitutes, are bound to serve all writs or process issuing out of the exchequer.

^a P. 1491.
c. 30.
P. 1663.
c. 10.

^b B. 1. tit. 10.
sect. 13.

^c Sup. tit. 1.

^d 6 Annæ,
c. 25.

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Observations on the Law of England, in relation to the Premises.

1. The original of sheriffs in England, the same as with us.

SHERIFFS in England were instituted in the same manner, originally, as with us, and for the like cause, *viz.* To remedy the inconveniencies happening by the mal-administration of the *Comites*, or antient Earls in their several counties, called from them, (*Comitatus*) which shews their original. And the sheriffs were appointed to judge in their stead; and hence they are called *Vice-comites*, as they are likewise in our law. They are created, by the king's letters patent, for a year, or may be constituted, *durante beneplacito*^a. This is the case of sheriffs-principal with us, by the late statute^b.

^a Coke 1. inst. 168.
^b 2. inst. 174.
^b 20 Geo. II.

2. The under-sheriff's duty; he is named by the high-sheriff, who is answerable for his actings.

THE Under-sheriff is the high-sheriff's deputy, and acts in his stead; and he may appoint any person he pleases such, and is responsible for his deputy. But, notwithstanding of such appointment, he may execute the office himself, if he thinks fit. And all returns made by the under-sheriff must be in name of the high-sheriff, who is only sworn to execute the office of sheriff, and therefore must answer for all^c. If the high-sheriff die before expiration of his year, the under-sheriff shall execute the office till another is appointed^d.

^c Coke 2. inst. 466. 9. rep. 49. Hob. 12. 13.
^d 3 Geo. I. c. 14.

3. The judicial power of sheriffs in England, consists in their courts of tourn and county-courts; the sheriff's tourn.

THE Judicial power of sheriffs in England is exercised in their court, called *Tourn* (from *tour*, *ambitus*, or Circuit) and County-court. The sheriff's *Tourn* is a court of record, held before him twice in the year, *viz.* within a month after Easter, and within a month after Michaelmas. In this court, smaller offences are punishable by fine or amercement, but it cannot imprison the offenders; and it is the only court that can fine, but not imprison. The jury must consist of 12 freeholders. Petty treasons, felonies and trespasses, *Vi et armis*, are cognoscible here by the jury, in order to secure the offenders; but are not punishable by this court; the sheriff is judge therein, as a court incident to his office^e.

^e Coke 4. inst. 260.

4. The county-court; it cannot cognosce regularly in matters above 40 shillings; but by writ of justices the sheriff may, in personal actions, to the highest extent, and likewise in trespasses, *vi et armis*.

THE county-court is held by the sheriff or under-sheriff, from month to month, on a certain day. It is no court of record, but only a court-baron, and can only hold plea between party and party; where the debt or damage is under 40 shillings. It hath no cognizance of trespasses, *Vi et armis*, or higher offences. But, by virtue of a writ of *Justicies*, the sheriff may hold plea of greater sums, and of all personal actions. This writ is so called, because it is a commission to the sheriff, *Ad justiciandum aliquem*, to do a man justice, and requires no return or certificate of what he hath done. Knights of the shire are here to be chosen^f; and, by special statute, the proceedings of sheriffs in their county-court are examinable by the justices of peace^g.

^f Coke 2. inst. 215. 312. 4. inst. 266.
^g 11 H. VII. c. 15.

5. The ministerial power of sheriffs consists in serving all writs and processes: the penalty upon making

THE Ministerial power of sheriffs in England, consists in executing all the writs issuing out of the king's courts; for no process is served, but by the sheriff, from the beginning of the suit till the execution is completed^h. A sheriff ought not to dispute the validity of the writ, but must execute it; and, if the court had jurisdiction, no action will lie against the sheriff, tho' the writ was perhaps illegal. If he makes no return, the court will order an attachment against him for

^h Coke 1. inst. 168.

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for his contempt; and, if he makes an insufficient return, he may be amerced; but, if he makes a false return, the party grieved may have an action of damages against him^a. In serving a writ of extent, if the jury's verdict is uncertain or defective, the sheriff must, at the request of the party, at whose instance the writ issues, call a new jury to ascertain the property of the goods; or even touching other effects that did not fall under the first verdict, which must be done before he makes his return^b.

^a Coke 5.
rep. 64.
1 Vent. 173.

^b Coke 3.
rep. 13. 4.
rep. 67.

In all cases where the process concerns the king, and in criminal causes, as felony, &c. the sheriff, after demand to open a door, and signifying the cause of his coming, on refusal, may break open the door of an house to execute his process: but, at the suit of a subject, the sheriff cannot do it, for one's house is his castle. But this privilege extends only to a man and his own family; and not to persons that fly thither, or remove their goods to another man's house fraudulently, to avoid execution^c.

^c Coke 4.
inst. 177.
5 rep. 91.

If the party arrested make resistance, or make an assault upon the sheriff when he is serving a writ, he may justify the beating of him; and if, in such case, the party is slain, it is not murder, nor punishable. But if any sheriff, in execution of process, is slain, it is murder in him that kills him, while doing his duty; for the law presumes precedent malice without proving it^d. The sheriff or his officers may arrest any one by night or by day, at the suit of the king, or a subject^e.

^d Dr. and Stud.
dial. 2.c. 41.
Coke 9. rep.
67.
^e Coke 5.
rep. 66.

It belongs likewise to the ministerial office of a sheriff, to serve writs for choosing knights of the shire, and to make out his precepts to the mayors of cities, and chief magistrates of borows, to choose citizens and burgesses. It is his duty also to preserve the rights of the king within his county, and likewise to seize, to the king's use, the goods of any felon, wreck of the sea, &c. And upon process out of the exchequer, he is to collect and bring into the exchequer fines and amerciaments, in respect of non-appearance of defendants and juries, and all forfeited recognizances; but these must be first Estreated by copies of the originals into the exchequer, and from thence process must be awarded to levy the same to the king's use^f. He must also see that criminals be executed, and take care that the order of law be observed in putting them to death; otherwise he will be guilty of homicide^g.

^f Ibid.

^g Dr. and
Stud. ibid.

By order of the common law and statutes in England, the sheriff, or other ministers of the king, in execution of the king's writs or process of law, may, after resistance, take the *posse comitatus*, or power of the county, to make the same effectual; and all persons within the county are bound to concur, except women, ecclesiastical persons, and such as are decrepit, or under 15 years of age^h. Which is likewise enjoined by an old statute with usⁱ.

^h Vin. (the
riffs) p. 431.
ⁱ P. 1426.
c. 98.

THE inhabitants of a vill or parish, tho' not incorporated, may, without the concurrence of the sheriff of the county, make ordinances and by-laws, for reparation of a church or high-way, or any other

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a wrong return; if the verdict is uncertain, he must call a new jury at the request of the party.

6. In a writ for arresting a person at the king's suit, he may break open the party's door; but not if at the suit of a subject.

7. If resistance is made to the sheriff in arresting one, and the party happen to be killed, it is justifiable; but if the sheriff is killed, it is murder.

8 It belongs to his office likewise to serve writs for choosing members of parliament; and to take care of the king's interest; and to execute criminals.

9. The sheriff, if occasion require, may call the posse comitatus, in order to execute writs in the king's name.

10. How far can the inhabitants of a vill or parish, tho' not in-

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incorporated,
make acts or
ordinances.

thing for the public good; and in such case the major part shall bind the whole. But the case alters, where the acquisition of an interest is in the question, as to prescribe right to a common; for that cannot otherwise be done, than by persons incorporated, who are always to have continuance ^a.

^a Vin. (inhabitants) p. 420.

T I T. XV.

Courts of Baillies, or Stewarts of Regalities before their Abolition.

1. Useful to know the nature of the courts of baillies of regalities, tho' now abolished.

THO' the jurisdiction of regalities, their stewarts and baillies, is abolished by the late act ^a; yet the knowledge of their courts will be useful, since it tends to explain our constitution, and many rights and securities of estates depend upon the legality of the proceedings before them.

^a 20 Geo. II. c. 43.

2. Stewarts of this kind, and baillies of regalities the same. Different from these are the stewarts of such stewartries, as are the same with shires.

STEWARTS and baillies of regalities were of the same importance; they had the same power and jurisdiction within their bounds, as the sheriff has within the sheriffdom; and the sheriff had for most part a cumulative jurisdiction with them. As to the independent stewartries, which are the same as shires, and still subsist, I have discoursed of them in the former title. And as to other heritable stewarts of such small stewartries, as were parts only of shires or counties, they are always conjoined with baillies of regalities in the act 1587, saving their rights from the general annexation of church-lands to the crown, and likewise in other statutes touching regalities, and seem only to be different names for the same offices. The bishops, or others of the dignified popish clergy, granted heritable rights of their regalities to persons under the one character or the other, as they fancied; but the jurisdiction is the same, and both are now abolished, with the regalities, by the before quoted late statute.

3. Baillies of regalities were either during pleasure, or heritable; the origin of those last.

BAILLIES of regalities were either those appointed by the lord of regality, during pleasure, who might be recalled when he thought fit, and, for that reason, ceased by his death; or heritable, who for most part were of those regalities, that had fallen into the king's hands from time to time, whereof there were heritable bailliaries established; particularly these which were created such by the popish ecclesiastical dignities, and whose rights were saved and reserved by the act of annexation. Those, who had the heritable jurisdiction under regalities, are sometimes termed Baillies, and sometimes Stewarts of the Regalities ^b, as above. The baillies and stewarts of regalities, and stewartries, or their deputies, might have held their courts at any time, without regard to the vacation-time of the court of session; which the sheriffs and stewarts of counties were, before the late act, regularly bound to observe.

^b P. 1440. c. 5. P. 1587. c. 29.

4. Could a lord of regality judge in his own court.

A LORD of regality could not sit himself and judge in his own court, but behoved to administer by a baillie, even in matters that concerned not his own interest, according to Sir George Mackenzie ^c. How this should happen, cannot easily be accounted for. It would seem, that a lord of regality must certainly have been invested with all the powers and privileges of a baron, who is of inferior dignity.

^c Crimin. b. 2. tit. 11. § 8.

Now

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^a 20 Geo. II.
c. 50.

Now a baron is intitled to judge in all causes where he is not a party, and was bound to do it himself in trials of capital crimes, while he remained vested with such power, *viz.* before the late statute ^a. Why then did the reverse hold in the case of a lord of regality? If such was the case, it may be justly here said, as in many laws, that *Non omnium, quæ a majoribus statuta sunt, ratio reddi potest*; but I doubt much if the law debarred him, because we have no statute to that purpose.

^b B. 1. tit. 3.
§ 98, &c.

BAILLIES of regalities had the privilege of repledging from the court of justiciary, as I have fully set forth elsewhere ^b. It was made a question, if, after judgment given by them, the court of justiciary had jurisdiction to review the same? And it was thought by some to be without their lordships sphere, courts of regalities having a peculiar jurisdiction, as was contended from their privilege of repledging. But, with submission, as the court of justiciary did exercise such power, so I conceive they were well intitled to it; for repledging was only a privilege which the party might use or not, but did not disable the other judge from having an original jurisdiction in the case, if no replegiation was used. And next, tho' baillies of regalities had been vested with a privative jurisdiction in the first instance, (which, however, was not the case) it could not have barred the justiciary, as the superior court in criminal matters, to review their sentences; as is plain from the case of maritime causes adjudged by the high court of admiralty.

5. Had the court of justiciary power of reviewing the sentences of baillies of regalities.

^c Leges Male.
II. c. 11. stat.
Alex. II.
c. 14. § 2.

LORDS of regalities commonly had, in their erection, the privilege of judging in the Four Pleas of the Crown, (as they are commonly termed) *viz.* Murder, Robbery, Ravishing of Women, and Fire-raising. But unless such jurisdiction was specially conferred, it was not competent to them; because those, by our old law, are particularly reserved to the king's justiciar ^c; and consequently it required a special grant to divest him of the same.

6. How far baillies of regalities could judge in the four pleas of the crown.

^d B. 1. tit. 2.
and b. 2.
tit. 3.
^e B. 2. tit. 3.
^f B. 3. tit.
last.
^g P. 1696.
c. 12.
^h Art. 19.
ⁱ 20 Geo. II.
c. 43.

A BARON, who had a right of regality, was a lord in point of jurisdiction, but still remained a baron and a commoner in other respects; nor got he the title of lord more than other barons who were all feudal Lords, as was formerly observed ^d. I have spoken at large elsewhere of a lord or baillie of regality's jurisdiction ^e, and of the abolition of the same ^f. At the same time, as the rights and privileges of borows of regality and barony were secured by our Scots statute ^g, and likewise supported by the treaty of union ^h, so they are saved by the late act abolishing the higher heritable jurisdictions ⁱ. And therefore, notwithstanding that the jurisdiction of lords and baillies of regalities is extinguished, those borows still continue in their former state, and may hold courts as before the act.

7. A lord of regality was only a commoner; his jurisdiction now abolished; the case of borows of regalities.

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THE courts of counties-palatine, which are reckoned among the superior courts of record in England, exercise a jurisdiction within their own precincts, in as ample a manner as the courts of Westminster; nor do the king's ordinary writs run into a county-palatine. They are said

1. The jurisdiction of palatine-courts in England.

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said to have *jura regalia*^a; and consequently may be termed Regalities.

^a Bac. new
abr. (courts)
633.

2. No new counties-palatine can be created at this day, without an act of parliament, more than regalities can be erected in Scotland.

THIS jurisdiction of counties-palatine (*viz.* Chester, Durham and Lancaster) is rather higher than that of our regalities and bailleries, now abolished by the late statute, was. And as no such jurisdictions can be created here in time coming, without an act of parliament, so neither can any palatine-jurisdiction, at this day, be erected in England, without a statute for that purpose^b.

^b Bac. *ibid.*

T I T. XVI.

Baron-Courts.

1. A baron ranked among judges ordinary; the sheriff has a cumulative jurisdiction with him; the case of the annexation of lands to a barony.

A BARON, in some of our statutes, is ranked amongst the judges-ordinary^a: he might well of old maintain that character; because his jurisdiction within his bounds was not much inferior to the sheriff's. The sheriff, however, has a cumulative jurisdiction with the baron. Nor will the annexation of lands to a barony, where the principal seat of the barony is in another sheriffdom, alter the case, as to different sheriffs their jurisdiction over the several parts of the barony, as they locally lie^b.

^a P. 1487.
c. 105.
P. 1540.
c. 81.

^b P. 1503.
c. 93.

2. The jurisdiction of barons in civil cases; their baillies must qualify to the government; their courts are not courts of record; verbal citations good before them.

NOTHING hindered a baron, or his baillie, formerly to judge in civil causes, to the greatest extent, except where others had a private or peculiar jurisdiction; tho' it was not ordinary to bring such as were of great moment before them; but now they are limited to actions for their rents, and, as to other cases, to sums within 40 s. Sterling^c. A baron may employ any person he pleases to be his baillie or depute, who must take the oaths to the government, by the aforesaid late act, and likewise he may choose his own clerk, but who regularly ought to be a notary^d, as I have shewed above^e. Baron-courts cannot be deemed courts of record; for which reason, extracts of their decrees are not effectual; but the principal minutes and judgments of the court must be produced, in questions concerning the same, before other courts, as in appeals to the circuit-court, or suspension or reduction of their decrees before the court of session, and in advocations from their courts; none of which is necessary, in the like cases of judgments or interlocutors of sheriffs, or other inferior courts which are of record. Tho' the old act^f requires that citations before baron-courts should have the same solemnities with those before other courts, yet that is not practised; for verbal citations, verified by the officer on oath, are sustained: thus, immemorial custom has privileged their erroneous proceeding, *et error jus fecit*.

^c 20 Geo. II.
c. 50.

^d P. 1540.
c. 81.
^e Sup. tit. 4.
sect. 1.

^f P. 1540.
c. 75.

3. Execution upon baron-decrees in civil cases.

IN executions upon decrees in civil cases before baron-courts, a baron-officer may poind, by carrying the goods to the ordinary place of the barony, appointed, or commonly used for that purpose, and apprising them there, without carrying the same to the market-cross of the next borow, as in other poindings; or even without a previous charge on 15 days. But letters of horning are not competent on a baron-decree; unless the sheriff's authority is first interposed thereto, which is done of course when applied for, and makes it in effect

fect a decree of the sheriff's. Such decree may justly be called a Decree-Conform; because it is as it were a transcript of the baron-decree, with the sheriff's warrant to put it in execution.

DESTROYERS of planting, stealers of bees, breakers of pigeon-houses, warrens, parks, orchards, and contraveeners of the act for preserving the game, might have been pursued before the baron-courts, or courts of other heritors, if taken within their bounds, in the commission of the act, or Red-hand, as the act bears. Others not so apprehended behoved to be pursued before the justiciary, or before the sheriff or steward within whose territory they dwelt^a; as now must be done in all cases where the penalty shall exceed the standard for barons and other heritors, by the before-quoted late statute.

4. Formerly their jurisdiction in criminal matters likewise most extensive; but now much limited; and in capital cases abrogated.

^a P. 1579.
c. 84.

BARONS, tho' not having power of Pit and Gallows, as jurisdiction in capital matters is expressed in our law, might have cognosed in crimes inferring imprisonment, or other arbitrary punishment, the right of barony implying jurisdiction in civil cases and trespasses. And, by the original constitution, a baron, having power of pit and gallows, might have judged in capital crimes^b. And, by provision of our old law, nothing hindered them to use that jurisdiction, especially as to thieves taken with the fang, *i. e.* in hand having, or upon back-bearing the thing stolen; and man-slayers apprehended red-hand, that is, in the act, or immediately upon commission of it. In those cases they must have passed sentence within three suns, or days, after the crime; but the execution might be respited for nine days thereafter^c. However, as the jurisdiction of barons, and other heritors, is much limited by the late act in civil cases, as above; so it is restricted to fines not exceeding 20 s. in criminal matters^d; and the jurisdiction of barons, in capital crimes, is wholly taken away, as is fully set forth elsewhere^e. All the profits and issues of baron-courts go to themselves.

^b P. 1426.
c. 91.

^c Quon. attach. c. 77.
c. 100.
P. 1695. c. 4.
^d 20 Geo. II.
^e B. 3. tit. last.

THOSE who obtain from barons, or other immediate vassals of the crown, rights *Cum curiis et bloodwits*, with the privilege of courts and bloodwits, may exercise the same as their heritable baillies^f. But jurisdiction in capital crimes could not be so communicated; because the baron himself behoved to sit judge in such cases, and could not therefore constitute an heritable baillie, in which character alone the subvassal could be vested with the jurisdiction. Other freeholders or subvassals having such jurisdiction, seem to be now on the same foot with barons; for the power of holding courts must imply a jurisdiction in civil cases, for 40 s. Sterling; and that of bloodwits to fine for trespasses, to the amount of 20 s. since, before the late act, it implied higher powers in both. And without such privileges, all persons infest in the property or liferent of lands have a power of judging as to their rents, equal to that of barons.

5. The case of heritors infest with the privilege of courts and bloodwits.

^f Decem. 12.
1665. Cranston. Gilm. decis. 174.

A BARON therefore, while he was vested with such jurisdiction, behoved to sit himself and judge in capital, and other criminal matters inferring corporal punishment; because the *Jus gladii*, or such eminent jurisdiction, cannot be delegated or committed to a baillie or deputy; unless there is a special power granted to him by the sovereign

6. A baron behoved to sit himself and judge in crimes, where the procedure

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was by way of inquest; and this is the case still in baronies belonging to royal borrows; and the provost for the time is the baron.

reign to that effect. This was likewise the dictate of the civil law, with this variation, that in case of absence it might be delegated ^a. In cases of such high importance, the trial must have been by inquest in baron-courts, as in all such cases before other criminal judges. And as the jurisdiction of borrows-royal is reserved by the late act, either within or without the royalty; where they have baronies, they must proceed in the same manner as formerly, and the provost for the time is the baron.

^a L. 1. ff. de offic. ejus cui mand. est jurisd.

7. An heir, or singular successor in lands, must be infeft before they can exercise acts of jurisdiction.

AN heir, or singular successor in a barony, as well as the original baron, must have been infeft by a public holding, before he could exercise the jurisdiction competent to a baron; because it is territorial, and it was the tenure or holding of the lands of the crown, by a feudal right, that established it, as to the privileges peculiar in former times to a baron. And still the heir, or singular successor in those or other holdings, must be infeft before he can exercise acts of jurisdiction that were competent to the predecessor or author.

8. Tho' a baron convey part of his lands, yet the residue is still holden to be a barony.

IT may be doubted if a baron, who has alienated the greatest part of his barony to be holden of the crown, continues still a baron as to the residue. I conceive, that since the baron's jurisdiction is territorial, it remains entire as to the parts reserved, if the same are of such extent as that the jurisdiction may still be exercised; for it is diffusive thro' the whole tenements subjected thereto. It is very true, the parts alienated to be holden of the crown lost the privilege of a barony, which became extinct as to the eminent capital jurisdiction, which could not be transmitted; and unless the baron has reserved sufficient for a qualification to vote in the election of a member of parliament, that must be lost, as in the case of other freeholders; but that does not alter his condition in other respects. I had occasion to observe elsewhere^b, that, in a barony descending to heirs-portioners, each, by act of the law, hath the privilege of a barony, as to her share in the division.

^b B. 3. tit. 5 sect. 5.

Observations on the Law of England, in relation to the Premises.

1. Of old, barons in England had the privilege of infang and outfang theft, and power of pit and gallows.

OF old, baron-courts in England had the same privilege as formerly with us, in judging persons guilty of Infang and Outfang-theft. The first was, where the thief was an inhabitant of the place, and taken within the barony, having the thing stolen in his hand, or carrying it on his back. Outfang-theft, where the thief was a stranger, taken with the thing stolen within the barony; or where the inhabitant was charged with the theft, but not apprehended with the thing stolen upon him. In both the above cases, the barons had power of judging the thief, and punishing him with the pains of death, if the heinousness of the crime deserved it; for which purpose the words Pit and Gallows, the ordinary instruments of execution in capital crimes, the women in those days being drowned in the pit, and the men hanged on the gallows, when adjudged to capital punishment, always accompanied the privilege of infang and outfang-theft. In which point our law, and the ancient law of England, agreed ^a.

^a Bract. lib. 1. tract. 2. c. 32. Spelm. gloss. (infang-theft) Reg. maj. lib. 1. c. 4. Quon. attach. c. penult.

2. A court-baron is the court of a

A COURT-BARON in England has, at present, no great jurisdiction; it is the court of the lord of a manour, who was anciently called Baron,

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Baron, instituted for the ease of the tenants; wherein they may sue for debts and damages under 40 s. but it cannot hold plea in trespass, *vi et armis*, because it cannot impose a fine. And, if a man recover in a court-baron, they have not power to make execution to him of the goods of the defendant; but the plaintiff may distrain him, and retain the goods till satisfaction^a. All pleas in a court-baron are, by course of law, determinable by Wager of law, (*i. e.* oath of the defendant) but by prescription may be tried by a jury^b.

lord of a manour; it can only hold plea for debt or damages under 40 s. but not for trespasses, *vi et armis*, nor can it impose a fine.

^a Vin. tit. (courts) 295, 296.
^b Bac. new abr. (courts) 649.

THE lord of a manour ought to hold his court-baron upon some part of the manour, otherwise it is void; but, if he hath two or three manours, and hath usually, time out of mind, held courts-baron at one of the manours for all, it is good^c. Our courts-baron are almost reduced, by the late statute^d, to the same state; but their decrees may receive execution, by pointing the defender's goods within the baron's jurisdiction; and they may likewise fine for trespasses, to the amount of 20 s. Sterling.

3. The lord of a manour ought to hold his court on some part of the manour.

^c Ibid. 258.
^d 20 Geo. II.

MANOURS and honours in England are, in some measure, similar to baronies with us. And as the king cannot create manours or honours at this day in England, so, by the late statute, he cannot baronies in Scotland, with the former privileges^e; but still those which were of old created, remain both in England and Scotland, with their privileges, however much abridged.

4. The king cannot create manours or honours at this day.

^e Ibid.

A COURT-BARON is by the common law, and of it the freeholders are suitors and the judges. But there is another court of a manour, called a Customary-Court, which concerns copyholders, and therein the lord or his steward is the judge. And whereas the title or estate of the copyholder is entered into the roll, of which the steward delivers him a copy; hence the tenant is called Copyholder^f. Every copyhold is parcel of the demesnes of the manour.

5. The court-baron is by the common law. The other court of a manour is the customary-court.

^f Coke Littl. 558.

IF all the frank-tenements of the manour are escheat, or the lord purchases them all except one, the court-baron is extinct; because there cannot be a court-baron without two freeholders suitors. And, if two co-parcenars make partition of a manour, and parcel of the demesnes and services is allotted to the one, and parcel of the same is assigned to the other, they are two manours; for, tho' a manour is not divisible by the deed of the party, yet this happens by act in law^g.

6. If all the frank-tenements escheat, or are purchased by the lord, the manour is extinct; the case of co-parcenars in a manour.

^g Vin. (manour) 218.

AN Honour is more than a manour, and cannot be otherwise created now than by act of parliament: but, when the king did make an honour, with its appurtenances, it was more than if a manour had been so granted; for to an honour, by common intendment, appertain high franchises, and by reason of those it is called an Honour, and frequently comprehends more manours under it^h.

7. An honour is more than a manour, including several franchises, and frequently more manours.

^h Vin. (honour) 109.

T I T. XVII.

Justices of Peace.

1. The jurisdiction of justices of peace chiefly concerns breaches of the peace; they are vested with all the powers of justices of peace with us of old; and farther, of those in England.

THE commissioners or justices of peace are entrusted chiefly with a criminal jurisdiction, as their title imports. They are instituted as guardians of the country, against disorders, riots, or other breaches of the peace, by binding persons suspected to their good behaviour, and punishing such as offend against the peace, by fine, scourging or imprisonment. Justices of peace, with us, have the several powers and authorities that were vested in justices of peace, by the laws of Scotland, before the union^a. And farther, whatever does appertain to the office and trust of a justice of peace, by the laws and acts of parliament made in England before the union, in relation to or for preservation of the public peace, is competent to them. But in the sessions of the peace, the methods of trial and judgments are to be according to the laws and customs of Scotland^b.

^aP. 1617.
^c7.P. 1633.
^c25.
P. 1661.
^c38.

^b6Annæ,c.5.

2. The justices of peace are to provide a fund for maintaining prisoners.

It is a necessary part of the office of justices of peace to rate the county for aliment to prisoners for crimes, during their confinement. And as magistrates of borows are bound to receive persons, ordered by warrant of the justices to be committed to their prisons, so the justices must cause satisfy the magistrates for the entertainment of such prisoners^c.

^cP. 1661.
^c38.

3. Horning competent on their decrees; for fines they may imprison the offenders till payment. Some civil cases committed to them; the oversight of high-ways, in conjunction with the commissioners of supply, their province.

LETTERS of horning are competent on their decrees^d. And as to these for fines, they commonly, as a part of their sentence imposing the same, ordain defenders to lie in prison till payment. Notwithstanding that the peace of the county, to which they are appointed, is the principal business of their commission, yet they have, in some particulars, a civil jurisdiction. They are judges to servants fees, workmens wages, the ordering and maintenance of the poor, concerning which I have spoken elsewhere^e. The oversight of high-ways, bridges and ferries, is peculiarly committed to them, by the law of England^f. But, with us, the commissioners of supply, or land-tax, are joined with them in that charge, and any five of the whole make a quorum^g, of which I have discoursed in another place^h. Some small matters, relating to the customs and excise, for preventing fraud therein, are annexed to the jurisdiction of justices of peace, and, in some particulars, their sentences therein are final; and they proceed to cognosce and determine, by fining the offenders, even in absence, in respect of the special power given them by the statutes in that behalf, contrary to the common rules of our law, whereby a party, for not appearing, can only be amerced for the contempt; but this procedure was necessary for security of the revenue, and a check to the infamous practice of smuggling.

^dP. 1661.
^c29. 38.

^eB. 1. tit. 3.
§ 59. 60.
^fDalton,
P. 511.

^g5 Geo. I.
^c29.
^hB. 2. tit. 7.
§ 21, &c.

4. Procedure before the justices of peace summary. One justice is sufficient in many cases, and two regularly

THEIR judicial procedure is Summary; because they sit only at particular diets, and the matters that come before them require dispatch. One justice is competent in some cases; but in all judicial proceedings in particular meetings, as well as at the general quarter-sessions, two are requisite to make a Quorum; and, in some special cases, a greater number is made necessary by express statutes. Some things

* P. 1661.
c. 38. 6 Annæ,
c. 5.

† 10 Annæ,
c. 15, &c.

things require the cognizance of the quarter-sessions. And all cases, decided in other meetings, or by particular justices, may be appealed to the general quarter-sessions, Which are the quarterly meetings of the justices of peace of a whole county, at the times mentioned in their commission, authorised by the statutes^a. Appeal to them from the sentences of particular justices, was of old used with us, and is declared in divers British statutes to be the regular method of proceeding^b.

THE jurisdiction of the justices of peace extends to capital crimes, by the tenor of their commissions; but that can only be for securing the offenders. For they only cognosce in trespasses or petty crimes, those of an heinous nature being of course tried before the justiciary, or other criminal judges. The justices may continue their sessions till their business is ended. And for convenient execution of their powers, and the better preservation of the peace of the county, they may divide themselves into districts; but that cannot divest any of them of jurisdiction thro' the whole county, as opportunity offers, or occasions require.

JUSTICES of peace have no coercive power out of their county; but they may do a ministerial act, as to examine a party robbed; or acts of voluntary jurisdiction, out of the county, as to take sureties for the good behaviour, recognizances or informations, &c. But they cannot, without their county, imprison a person for not giving a recognizance; or commit one for a crime^c.

^c Bac. new
abr. (justices
of peace)
293.

IF one pursued for a bare misdemeanor, upon a warrant of a justice of peace, escape into another county before arrest, the officer, in virtue thereof, cannot pursue him into the other county. But, in case of an affray, felony, or dangerous wounding, he may follow the offender into a foreign county; and, if he take him there, he must bring him into the goal of the county where he is taken. For the officer does not take him purely by such warrant, but in virtue of the authority which the law gives him for the public good, and the warrant is a sufficient cause of suspicion^d. This, I conceive, will hold with us, since the powers of justices of peace in England is communicated to those in Scotland, so far as concerns the preservation of the peace.

^d Bac. ibid.
294.

IT is ordained by statute, That where one is named a justice of peace for any county within this realm, if he happen to dwell in any city, or other precinct that is a county of itself, he may grant warrants, take examinations, and make orders at his own dwelling-house; which, and the execution of the same, are declared good and effectual. But the justices of peace cannot, by virtue of that act, hold their general quarter-sessions of the peace within such city or town, act or intermeddle in any matter or things arising therein^e.

^e 9 Geo. I. c. 7.

ALL offences against the regulations touching lintseed and hempseed, and the linen and hempen manufactures, (except forging the seal or stamp, wherewith linen offered to a market must be stamped, which is to be tried before the justiciary) must be prosecuted before

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is a quorum; but sometimes, in particular cases, more made necessary by special acts. Appeal lies from particular justices to the quarter-sessions.

5. How far their jurisdiction extends to capital crimes; they may continue their sessions, and divide themselves into several districts.

6. How far justices of peace may act without their county.

7. May an officer, upon a justice of peace's warrant, follow the offender into another county.

8. A justice of peace for a county, residing in any city or precinct, that is a county of itself, may act there.

9. Offences, touching linen and hempen manufactures, where to be prosecuted.

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one or more justices of the peace, or the magistrates of borows where they happen; nor is any suspension to be granted, in these matters, of their sentences, and appeal is only competent to the next quarter-sessions, by special statute. If the justices of peace, or magistrates, neglect or refuse to put this act in execution, they are liable to a fine not exceeding 100 *l.* to be recovered before the justiciary or circuit-court ^a. This act is peculiar to Scotland.

^a 13 Geo. I.
c. 25.

10. New regulations, as to the linen-manufacture, by a late statute.

By a late statute, the act above quoted ^b is explained, amended and enforced, and divers regulations are further made for encouraging the linen-manufacture in Scotland, in order to prevent frauds in relation to lint and hempseed, or in making the cloth, and preparing it for sale. And all offences against the act may be tried by one justice of peace, or magistrate of a borow, subject to an appeal to the quarter-sessions; or by the sheriffs, subject to an appeal to the circuit-courts. The action must be brought within 12 months from the offence committed, and the penalties go to the informer or prosecutor ^c. And the trustees for the manufactures in Scotland have the charge of seeing the same, and the other acts relating to that manufacture put in execution.

^b D. 13 Geo. I.
c. 25.

^c 24 Geo. II.
c. 44.

11. Questions between clothiers and weavers, &c. where to be determined.

ALL questions relating to work, wages or damages, between any clothier or maker of woollen goods, and weaver, or other person employed in such manufacture, are to be finally determined by any two or more justices of peace, with liberty to appeal to the next quarter-sessions, and such processes are not to be removed from them by any form or process of law. The fines and damages awarded by the justices of peace, or magistrates, in pursuance of this act, are to be levied by distress and sale of the offender's goods; and, in default thereof, by imprisonment, not exceeding three months ^d.

^d 13 Geo. I.
c. 22.

12. The singular case as to cloth or woollen goods, &c. stolen in the night-time. The trial competent before one justice of peace.

It is likewise provided by statute ^e, for the more effectual preventing any cloth or woollen goods remaining on the rack or tenters, or any woollen-yarn, or wool left out to dry, from being stolen or taken away in the night-time, That any justice of peace, upon complaint by the owner within 10 days, may order a constable in the day-time to search houses, where the claimer declares upon oath he suspects the goods taken away are; and if the same shall thereupon be found and seized, the possessor must produce the person from whom he acquired them, or some other credible witness to depose upon the property, within such convenient time as the justice shall appoint; or otherwise he shall be holden as convicted of the offence, and be subject, for the first offence, to treble the value; and to the same penalty for the second, with the addition of six months imprisonment. The case may be cognosed by one or more justices of peace, with liberty to appeal to the quarter-sessions, whose judgment is final. The party for the third offence shall be forthwith committed to prison, till the next assizes or circuit-court; and, if he do not exculpate himself, in manner above, he shall be adjudged guilty of felony, and subjected to transportation for seven years. And this act is not to extend to repeal or alter any other law in force, against such offender, upon full proof of the crime.

^e 15 Geo. II.
c. 27.

As

^a P. 1707.
^c 13.
^b 24 Geo. II.
^c 23.

As the justices of peace have the charge of preserving the peace of their county, so it is their business to prevent and correct all irregularities and disorders in it. And therefore the execution of the acts for preserving the game belongs to them, as well as to the sheriffs of the respective counties, by our former law ^a, as likewise by the late British statute ^b. By this last it is enacted, That none shall kill or destroy any muir-fowl from the first day of January to the 10th of July, or any partridge or heath-fowl from the first day of February to the 20th of August in any year. Nor shall any person, at any time of the year, have in his custody, or carry any hares, partridges, pheasants, muir-fowl, heath-fowl, snipes or quails, unless they be qualified to kill game in Scotland, or have obtained a licence or order of a qualified person for that purpose.

13. The preserving the game the province of the justices of peace; particulars introduced by the British statute as to that matter.

It is likewise ordained by this statute, That every person transgressing the same shall, for the first offence, forfeit and pay the sum of 20 s. Sterling; and for the second, and every other offence, 40 s. Sterling; to be levied by distress and sale of the offender's goods, and, in case of insolvency, he shall suffer six weeks imprisonment for the first fault, and three months for every subsequent offence. And the prosecution may be carried on, either at the instance of the fiscal of court, or of any other person who will inform or complain, and that before any two of the justices of peace, or sheriff of the county where the offence was committed, to be determined by the oath of the defender, or one or more credible witnesses. And the person aggrieved by the justices may appeal to the next quarter session; or, in case the judgment was given by the sheriff, to the lords of justiciary in their next circuit; or (where there are no circuit-courts) to the court of justiciary at Edinburgh; and the determination in such appeal respectively shall be final. The one moiety of the forfeitures to be incurred for offences against this act shall go to the informer, and the other to be applied to such public services as the judges, before whom the offender shall be convicted, shall direct.

14. The penalties on transgressing the act.

^c L. 29. ff.
 de legibus.

^d P. 1707.
^c 13.

This British statute does not repeal our former laws; and it refers to them as to persons qualified to kill game. And therefore it must hold here, that *Posteriores leges ad priores pertinent, nisi contrariae sunt* ^c, i. e. Posterior laws are to be drawn to the prior, so far as they do not derogate from the same; and consequently the Scots statutes still subsist, so far as they are not altered by this. The variations are 1. That the prohibited season is enlarged for the better preserving the game. 2. No person, at any time of the year, can have in his possession any of the beasts or fowls of the game, without licence from a qualified person; whereas formerly this took place only during the prohibited season. 3. The penalty by the former statute ^d was 20 l. Scots for every offence, which is now varied, as above. But that does not take away the forfeiture, by the same act, to the apprehender or discoverer of the dogs, guns, and nets, belonging to any common fowler that hunts upon one's ground without his warrant; nor the prohibition thereby enacted upon any person to come within an heritor's grounds, with setting dogs or nets, without his leave. As to what qualifies one to kill game, it is plain, from what is above, that every heritor may hunt or fowl upon his own ground, and

15. Our former laws still in force, so far as not varied by this act. The qualification for killing game, and other matters, by the Scots act.

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and that none other is intitled to do it without his consent; and that, notwithstanding a former act ^a, which seems to require 1000 *l.* of valued rent to qualify one; for that act plainly refers to the Masters of the game, long since discontinued; and, however, is varied by the later act ^b.

^a P. 1685.
c. 20.

^b D. P. 1707.
c. 13.

16. The limitation of the action upon this statute.

As this British act does not limit any time to the action for the penalties thereby introduced, it may be thought, that the act of queen Elizabeth ^c must take place, limiting such popular actions to one year, which, in such case, is the rule, as I have shown elsewhere ^d.

^c 35 Eliz.
c. 5.
^d B. 2. tit. 12.
observ. § 22.
^e 24 Geo. II.
c. 44.

17. How justices of peace, or constables, to be sued for wrongs done by them in the execution of their offices.

By a late statute ^e It is provided, That no writ shall be sued out at the suit of a subject, against any justice of peace, for any thing done by him in the execution of his office, until Notice, in writing, of such intended writ or process, shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for such party, one month before suing out the same. And no evidence shall be given of any cause of action, except such as is mentioned in such notice. And the justice of peace may, within a month after such notice, tender amends to the party complaining, or his agent or attorney; and in case the same is not accepted, the justice of peace may plead such tender in bar to the action, together with the plea of Not guilty, and any other plea, with leave of the court. And if the jury shall find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit, or judgment be given for the defendant upon demurrer, he shall be intitled to such costs as he would be intitled to if he had pleaded the general issue only. And if it shall be found That no amends were tendered, or that the same were not sufficient; and also against the defendant on such other plea, they shall give a verdict for the plaintiff, and for costs and damages. And in case the judge, before whom the cause is tried, shall, in open court, certify that the injury, for which the action was brought, was wilfully and maliciously committed, the plaintiff shall be intitled to double costs of suit. No action shall be brought against a justice of peace for any thing done in execution of his office; or against any constable, or other officer acting by his warrant, unless the same be commenced within six calendar months after the act committed. Tho' the stile of this statute be adapted to proceedings in the courts of England, yet it may justly be thought, that, by the spirit and intendment of it, the same must take place here, since it is not limited to England.

18. Reference to other authors, and the subsequent observations as to the powers of justices of peace.

THERE are various matters that fall within the province of the justices of peace, besides these I have taken notice of; but which would require a volume, and may be seen in the authors that write at large professedly on that subject. And some matters, contained in the following observations, concern justices of peace with us, in respect of the communication of the powers competent to justices of peace in England to those in Scotland, as above.

Observations

TIT. XVII. Observations on the Law of England, &c. 573

Observations on the Law of England, in relation to the Premises.

SOME, by virtue of their offices, have power to keep the peace, as the Lord-Chancellor, or Lord-Keeper: thus likewise, every justice of the king's bench hath a general authority incident to his office to keep the peace throughout all England; but no duke, earl or baron, as such, hath any greater authority in this matter than meer private persons^a.

^aHawk. b. 2. c. 8. § 1, &c.

1. The chancellor and justices of the king's bench have authority to keep the peace.

EVERY sheriff is a principal conservator of the peace, and may, without doubt, *ex officio*, award process of the peace, and take security for it^b. This is implied in the king's commission, by which he is intrusted with the custody of the county, and consequently must keep the peace within it. But, by an old statute in England, he cannot be a justice of peace in the proper sense, *viz.* by the king's commission appointing justices of peace for each county, who came in place of the conservators of the peace, anciently in use^c. But, in the commissions of the peace to gentlemen in counties here, the respective sheriffs, as such, are generally mentioned among them.

^bIbid. § 4.

^c1 Mary, sess. 2. c. 8.

2. The sheriff, *ex officio*, may award process of the peace, and take security for it.

It hath been of late settled, that justices of peace have no jurisdiction over forgery (even when it is not capital) and perjury, or in any offences against statutes made since the erection of their jurisdiction, unless it is particularly given to them; because their office was instituted for preservation of the peace, against personal wrongs and injuries, whereby a breach of the peace may happen, and the word (Trespass) in their commission must be so taken^d.

^dHawk. *ibid.* § 38.

3. Justices of peace have no jurisdiction in forgery or perjury, nor in any offence against statutes made since their erection.

THE sessions of the justices of peace are either General Quarter-sessions, holden in the four quarters of the year, pursuant to the statute^e; or other General Sessions at other times, in execution of their authority, which, by the same statute, they are authorised to hold; *viz.* such as they hold on particular occasions, for the execution of some branch of their office.

^e12 H. III. c. 4.

4. Sessions of the peace are either general quarter-sessions, or other general sessions.

THE justices, in their sessions, cannot amerce any of their number for absence or misbehaviour, since *Par in parem non habet imperium*. For the punishment of persons in a judicial office, with reference to their behaviour in office, must be referred to superior judges^f.

^fVin. (sessions of the peace) 343.

5. The justices cannot amerce any of their number for absence or misbehaviour.

AN order by one quarter sessions cannot be altered by another; but at the same sessions the justices may, on reconsidering the case, alter their order or sentence: for the judgment is in the breast of the court all the same sessions^g.

^gIbid. 347.

6. An order by one session cannot be altered by another.

By special statute^h, no *Certiorari* shall be allowed for removing any order of the sessions of the peace in England; unless the party enter into a recognizance with sureties, in the sum of 50 *l.* to prosecute it, and if he does not, the judges may proceed. They may adjourn their sessions, but not so as to run into another subsequent quarter sessionsⁱ.

^h5 Geo. II. c. 19.

7. How far an order of the sessions may be removed; or can the sessions be adjourned.

ⁱVin. *ib.* 357.

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8. The settlement of the poor, in the proper towns and parishes, belongs to the justices of peace. The various ways of gaining a settlement: the method of removing one from a place where he has no settlement.

THE settlement of the poor in the proper towns and parishes belongs to the justices of peace. I have spoken elsewhere how one gains a settlement in any place^a. It is provided by statutes^b, That, upon complaint by the church-wardens and overseers of the poor, to a justice of peace, within 40 days after any person's coming to settle in a house, under the yearly value of 10 l. likely to become chargeable to their parish, it shall be lawful to any two justices of the peace to remove such person to the parish whence he was last legally settled, as a native, house-keeper, sojourner, apprentice or servant, unless he give security to indemnify the parish; the 40 days continuance to make a settlement is to be accounted from the time of the party's delivery of notice to a church-warden or overseer, in writing, of the house of his abode, and number of his family.

^a Vol. I.
p. 152 § 5.
^b 13 14 Ch II.
c. 12. 1 Ja. II.
c. 17.

9. The precaution in awarding surety of the peace; how far is this obtained against a peer.

A JUSTICE of peace ought not to award the giving surety of the peace against any one; unless the party who applies for it make oath That he requires the same for safety of his person. The usual way of proceeding against a peer, in such case, is a complaint to the court of chancery, or king's bench^c.

^c Vin. (security of the peace) 107.

10. The method for quashing orders made by the church-wardens for a poors rate.

AN appeal lies to the quarter-sessions, upon orders made by the church-wardens for a poors rate, to quash the same, and this regularly ought to be the next quarter-sessions; but it may be even to subsequent sessions; and the proceedings of the justices thereon are subject to the review of the court of king's bench^d. And, by the same rule with us, to the cognizance of the court of session.

^d Rep. of cases in B.R. printed 1737. The queen, v. the par. of St. Giles.

11. A justice of peace in England must have 100 l. of yearly rent, free of all incumbrances; what if one not thus qualified acts.

IT is a qualification of a justice of peace in England, that he have an estate of freehold or copyhold for his own use and benefit, in possession for life, or for 21 years or more, in the same county, of the yearly value of 100 l. over and above what will discharge all incumbrances. And if any person accept the office of a justice of peace, or do any act, as such, contrary to the direction of the statute, he shall, for every offence, forfeit 100 l. But it does not extend to any city or town having justices of peace within their precincts, by charter or otherwise, and is limited to England^e.

^e 5 Geo. II.
c. 18.

12. The quarter-sessions are to determine appeals, according to the merits, notwithstanding any defects in the original proceedings.

JUSTICES of peace in England, by another statute^f, are specially enjoined to determine, in their quarter sessions, appeals made to them, according to the merits of the cause, notwithstanding any defects in the original proceedings; and persons, who, by writ of *Certiorari*, remove such causes, must find surety to prosecute the same to effect, and for costs of suit. As to the not regarding the nicety of form by the quarter sessions, a similar rule takes place here, from the nature of the thing, the justices of peace's courts not being tied to precise forms. And as to removing causes from them to higher courts by advocations, (which is to the same effect as by a writ of *certiorari* in England) our superior courts are tender in allowing such advocations.

^f 5 Geo. II.
c. 19.

13. The import of the statute vesting justices

THO' the British statute, renewing the institution of justices of peace with us gives them the same powers which those in England were vested with at the time^g, yet that cannot concern any powers grant-

^g 7 Annz, c. 7.

^a 3 H. VII.
c. 3. 32 H.
VIII. c. 43.

^b 5 Geo. II.
c. 19, &c.

^c 7 Ja. I. c. 5.

^a Hume (com-
missioners of
supply) July
23. 1735.
Hay.
^b 2 Geo. II.
c. 4.
^c Art. 9.

^d Feb. 1730.
Ross contra
Agnew.
^e Feb. 8.
1751. Suther-
land.

granted to justices of peace, or qualifications made necessary to them in England, by subsequent statutes, as is plain. And indeed, the fore-
said communication of powers is limited by the statute, to such as
concern the maintenance and conservation of the peace^a. Sometimes
commissions of the peace mention certain of those named to be Jus-
tices of Quorum, so called; because one of them must be present to
constitute a quorum in some particular cases^b. We have none such
in the commissions of peace in this country; and indeed, in the later
statutes, touching justices of peace, there is no difference made in
that respect.

of peace in
Scotland,
with the same
powers as
those in Eng-
land.

THERE is a particular statute in England^c, which enacts, "That
" if any action be brought against a justice of peace, or other infe-
" rior officer of the peace, concerning any thing done by them in
" virtue of their office, and the verdict pass for the defendant, or
" the plaintiff be non-suited, the defendant shall recover double
" costs." It would seem, that since justices of peace, with us, are
invested with the same powers, in respect to the conservation of the
peace, as justices of peace in England, they are intitled to the same
privileges and security in the exercise of such powers.

14. If any
action is
brought a-
gainst a jus-
tice of peace,
or other in-
ferior officer
of the peace,
and the plain-
tiff succumb,
he is liable
to the de-
fendant in
double costs.

T I T. XVIII.

Commissioners of Supply.

THE Commissioners of supply or cess, (as the Land-tax is gene-
rally called with us) tho' not judges-ordinary, yet have com-
mission in particular matters from the parliament, by the respective
acts imposing the land-tax, which contain the nomination of the
commissioners. But notwithstanding they are specially named, yet
the same statutes require qualifications, which if they have not,
they cannot act, particularly, that they shall have lands of 100 l.
Scots of yearly valuation in property, superiority or liferent. If su-
perior and vassal are named commissioners, they have both title to
officiate, in respect of the same lands of 100 l. of valued rent; because
the act makes no distinction between the one and the other. If they
are not thus qualified, and yet act, their actings are void, and they
incur the pain of 20 l. Sterling^a. They are impowered to do every
thing concerning the supply, as is prescribed in the cess-act 1706,
and the acts therein referred to^b; which is conform to the provision
in the treaty of union^c. In constituting the meeting, by choosing
a preses, all who are in the nomination may vote upon their hazard;
because, till that is done, there is no regular meeting or court, and
without such, the objections against any in the commission cannot be
judged^d. However, they must qualify, by taking the oaths to the
government, before they presume to act; otherwise their actings are
void, the statute in that respect being express^e.

1. Commis-
sioners of
supply, they
are impower-
ed to do e-
very thing
that was
competent to
them at the
time of the
union; their
qualification
100 l. of va-
lued rent;
what if those
not qualified
act.

THEY have power to name a collector of the supply, for whom
they shall be answerable, and therefore generally they exact caution
from him; and likewise to name their clerk, for whom they must
also answer; and to appoint salaries for both, to be paid by the shire,
and to make regulations for the more convenient payment of the cess

2. Their of-
fice: they
appoint a
collector of
the supply,
for whom
they must be
OR

answerable, and a clerk to their meetings; their chief business is to proportion the supply.

or supply. The principal business of the commissioners is to proportion the cefs equally upon the several lands within the shire, and for that end to regulate their respective valuations. But whatever rectifications or regulations they make, care must be taken, that the total proportion upon the whole county be kept intire, without diminution. The several British statutes, appointing them yearly, refer to the Scots acts which give them such powers^a.

^aP. 1690. c. 6.
P. 1706. c. 2,
&c.

3. Are the actings of the commissioners liable to the review of the court of session.

THE commissioners of supply therefore have the only power of proportionating the valued rent upon the several lands within the shire; or dividing it, where lands that belonged to one person, and had been subject to a certain valuation, come to be in different heritors hands, which ought to be done conform to the payable rent of the respective lands. It hath been doubted, if their actings in that respect are subject to the review of the court of session; for that they being vested with a commission from the parliament, it was pretended, that their judgments in that behalf should be final. But this is no good reason, for they are still but an inferior court; and since their judgments are not, by the statutes vesting them with their powers, declared final, the same must be subject to the review of the court of session; who have, by our common law, jurisdiction to rectify the proceedings of all inferior courts, in relation to our property. And That of the valuation greatly concerns it, not only as to the capacitating persons, in that respect, to elect, or be elected members of parliament; but likewise in consideration, that all public burthens, as the land-tax, &c. are proportioned conform to the valuation; and the division of commons proceeds by the same rule. And accordingly the court of session found themselves competent to review and rectify the proceedings of the commissioners of supply in the premises^b; and indeed, if it were otherwise, the consequences might be very inconvenient.

^bFeb. 12.
1751. Sir
John Gordon.

4. Compulsors for the more ready collecting the supply. None bound to produce receipts after three years; is it *debitum fundi*.

THE collector may arrest and poind the goods, or imprison the persons of deficients, in payment of the cefs. And the commissioners (three of them at least) may appoint quartering of soldiers upon them, *i.e.* that a party of soldiers may be sent to levy the cefs or supply from them, and, in the mean time, to have free quarters, or so much a-day for the same. No person is bound to produce receipts or discharges of the supply, or land-tax, after three years of the term of payment, unless diligence was done for it; and even in that case, the prescription is only prolonged for one year more^c. The cefs, by means of the foresaid remedy of quartering, necessarily affects the heritor or possessors of the lands for the time, within the three years of limitation or prescription aforesaid; and in that respect may be esteemed *debitum fundi*, or a real burthen affecting the land. I have discoursed a little upon this point elsewhere^d, to which I shall add no farther.

^cP. 1690. c. 6.
P. 1707. c. 2.

^dB. 2. tit. 5.
§ last.

5. The magistrates of burghs-royal, commissioners for proportionating the cefs

THE magistrates of borows-royal are appointed commissioners for proportionating the cefs upon the several inhabitants, and they name stent-masters for that purpose. Those inhabitants who have lands within the burgh, or trade therein, are liable to be burthened; but not in respect of their lands in the country, unless they are borow-lands;

TIT. XIX. The Jurisdiction of Royal-Borows. 577

^a P. 1587.
c. 112.

lands; and those who have lands within burgh cannot be stented on account of their trade, if they dwell not in the burgh, or traffick there^a. Any that are unequally stented may obtain redress from the lords of session, who will oblige the town to alter their stent-rolls, in the same manner as they may rectify the judgments of the commissioners of supply, in relation to valuations, as above-mentioned.

upon their
inhabitants;
parties
wronged may
be redressed
by the lords
of session.

THE convention of borows proportion, upon the several burghs, their respective shares of the cess falling upon the whole.

6. How the
cess propor-
tioned upon
borows.

THE commissioners of supply, in conjunction with the justices of peace, have the charge of high-ways and bridges committed to them, as I have shown in the preceeding title, and more at large in another place^b.

7. The con-
cern of the
commission-
ers in the
high-ways.

^b B. 2. tit. 7.
§ 21, &c.

T I T. XIX.

The Jurisdiction of Royal-Borows.

^a Nov. 14.
1679. magi-
strates of
Kirkcaldy.

THE judicative power of royal-borows is in the magistrates; for, tho' the town-council is the representative of the burgh, yet they have no judicial capacity^a. The town-council however, by virtue of their jurisdiction, make acts and by-laws for the better government of the borow, the management of their public funds, and other matters relating to its policy: but the magistrates, who are the principal constituent members of the town-council, have the exercise of judicature. This, in some measure, is after the model of the highest court; the parliament has the legislative power, but the judicative is in the house of peers.

1. The judi-
cative power
of royal-bo-
rows in the
magistrates.
The town-
council re-
present the
borow, and
make acts
touching its
policy and
government.

^b L. 7. § 1. ff.
quod cujus-
que univ.

^c Fount. Feb.
15. 1695.
Boyne.

^d Marcus (ma-
gistrates)
March 3.
1688. town
of Glasgow.

THE magistrates and town-council may grant bonds for affecting the community, and its public funds, and even the granters of them in their private capacity, and their heirs, if they had not only bound themselves in their public capacity, and their successors in office, and thereby the borow, but likewise themselves and their heirs in a private capacity; or, if there was fraud on their part in the contracting, or if the money was applied to their own particular use. But such bonds will not affect the other burghesses or heritors in their persons or private estates^b, and which rule will hold as to the representatives of all other communities and corporations. But regularly magistrates, after dismissal from the office, are not liable for bonds granted by them *ratione officii*, or on account of such character, but only the magistrates for the time, and the community^c. The magistrates and town-council cannot release a bond granted to the borow, without payment of the sum, even tho' such discharge were given For good deeds done to the burgh; for such affected pretences, were they allowed, might be very detrimental to the corporation^d. On deficiency of the common funds, the magistrates and council may likewise, on occasions, impose rates or burthens to answer the exigencies of the borow for the common utility, and therewith affect the burghesses as to their traffick. And likewise the heritors of lands and tenements within the borow, public intimation being always previously made to them by beat of drum, and notifying the occasion

2. Bonds
granted by
magistrates
and town-
council regu-
larly affect
the commu-
nity only;
but may be
conceived so
as to bind
the subscrib-
ers, and their
heirs, but not
the other
burghesses in
their personal
capacity. In
what cases
can a rate be
made upon
the inhabi-
tants for an-
swering the
exigencies of
the burgh.

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of the stent or burthen, and time of the meeting; and with consent of the major part of such as convene, and which must be proportioned by sworn stent-masters. But such rates or stents are still subject to the review of the court of session, if they are groundless, or unequally proportioned ^a.

3. In what cases can a borow be punished for the crimes of their magistrates and town-council.

THE crimes and delinquencies, committed in consequence of acts of the town-council, may infer punishment against the borow, by fines, or forfeiture of their public funds, and of their privileges; and, in atrocious crimes, even a total extermination. Instances of that kind occur both in sacred and profane history. The particular persons guilty are, no doubt, in such case liable to the ordinary pains of law, in their private capacity; but such as are not accessory cannot be subjected to any punishment in their own persons or estates; since that could only be the consequence of guilt and demerit ^b. They suffer indeed consequentially, as members of the corporation, by the loss of their freedom and interest in the rights and privileges of the borow; because these are subjected to the power of the administrators. We have instances of late, where a royal-borow has been assessed, by statutes, in sums of money, to indemnify persons aggrieved by a riotous assembly in the borows, on account of the presumed remissness of the magistrates, in not using their utmost endeavours to prevent or restrain them ^c.

^a P. 1597.
c. 280. Feb.
14. 1672.
Forbes. Jan.
11. 1678.
the town of
Aberdeen.

^b L. 26. ff.
de poenis.

^c 12 Geo. I.
c. 26. 16 Geo.
II. c. 34.

4. Royal-borows erected by our kings, their setts; the election of their magistrates and town-council.

BOROWS-ROYAL have been erected from time to time by our sovereigns, whence they have their denomination, and their privileges are established by divers statutes, and are reserved to them by the union ^d, and likewise by the late statute abolishing our higher heritable jurisdictions ^e. Their government must be regulated by the statutes for that purpose, and the Setts of the respective burghs not derogatory thereto. These setts, or constitutions of the burghs, are either established by immemorial use, or modelled to them by the convention of borows ^f. Their old council ought to choose the new, at, or about the term of Michaelmas yearly, and both old and new council elect the magistrates, and other officers of a borow. No person can continue magistrate, or other officer, within burgh (except counsellors) more than two years ^g: therefore the old statutes are in desuetude, so far as they provide, that officers of burghs shall not be continued farther than one year, but in other respects they are in observance ^h. The number of counsellors, and quality of them, depends much upon the sett of the respective borows. In some, the deacons of crafts are constituent members, in others they have no claim of membership ⁱ. The manner of election of the magistrates and council varies, according to the sett of the borow. It appears from the old statute ^k, that formerly it was by a poll-election; for it plainly sets forth the inconveniency of a popular election, and prescribes a new method, which, in the main, is the standard at this day.

^d Art. 21.

^e 20 Geo. II.

^f Edgar. Feb.
11. 1724.
the trades
and magi-
strates of In-
verness.
^g Jan. 27.
1681. Jack.

^h Nov. 1734.
deacons of
Kirkcud-
bright.

ⁱ P. 1469.
c. 29. P. 1503.
c. 80. Jan. 27.
1681. Jack.
^k D.P. 1469.
c. 29.

5. The deacon-conveener's court.

IN some borows there is a Conveener's court, which consists of the deacons, and deacon-conveener created by them. This court has only power of making by-laws, in relation to the several corporations, the deacons whereof compose it, for the right government of the same,

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same, but no other jurisdiction. And where they assume a judicative power, their actings are void; for, as each of these deaconries have no such authority, their uniting together can give them none, more than many cyphers can make a figure. And therefore, their pretended acts and decrees, as irregularities, were justly found liable to the controul of the magistrates, so far as concerned the vindicating their own jurisdiction, by ordaining the record of the encroachments thereon to be destroyed; reserving to the superior courts the punishment of such disorders, and the giving redress to the parties aggrieved thereby ^a.

^a Bruce decis. 103. July 1736. deacons of Air.

THE Convention of the borows, upon proper applications, do make or vary the setts of particular borows, as they see cause. Which power, I conceive, is competent to them, by the words of the statute, giving the commissioners of borows, in their convention, *Full power to treat upon the good rule and statutes, for the common profit of borows* ^b; but they cannot intermeddle in the election of deacons, magistrates or counsellors of royal-borows.

^b P. 1487. c. 111.

6. The convention of borows.

By this parliamentary institution of the convention of borows, they are a great corporation, and their privileges are ratified by subsequent parliaments, in the strongest terms. Each royal-borow is to send one member to it, and the city of Edinburgh two. They were originally to meet at Inverkeithing yearly, but thereafter four times in the year, in what burgh they pleased ^c. At present they meet yearly in July at Edinburgh, but they may assemble oftner, if occasion require. Their principal business is to treat upon merchandize; and the good rule and statutes, for the benefit of the borows, as the act establishing them expresses it ^d. Letters of horning are competent upon their decrees, which, by an unprinted act, proceed at the instance of the agent for the borows ^e. They seem originally to have had cognition, as to the election of magistrates and town-councils of burghs; but now these matters are under different regulations, and abuses therein can only be redressed by the court of session, as shall presently appear. There is generally a Committee appointed by the convention, to advert to the interest of the borows in the intervals of the meetings of the convention; which committee may advertise an extraordinary meeting of the convention, upon emergencies, as the necessity of the case shall require.

^c P. 1578. c. 64. P. 1581. c. 119.

^d P. 1487. c. 111.

^e M'Kenzie's observat. on P. 1581. c. 119.

7. The constitution and business of the convention of borows.

^f 16 Geo. II.

^g Jan. 1745. in the case of the magistrates and town-council of Inverkeithing.

In consequence of the late British statute, summary application may be made to the court of session, for rectifying any wrongs committed in the election of deacons, magistrates or counsellors of borows, within two months after the respective elections, and for ascertaining the counter-election made by the complainers ^f. On these occasions the lords determine the qualifications of the respective electors; and, in a late case, learnedly argued at the bar, and deliberately advised on the bench ^g, the lords found, That the old deacons had a right to sit in council till the new ones were received, and that their votes ought to be regarded, as given in council, conform to the nomination they made of the magistrates for the ensuing year, at the stair-foot of the court-room, they being forcibly debarred from entering the court; and that force used in the election was relevant or sufficient

8. Redress competent directly, by summary complaint to the lords of session, against all wrongs done in the election of deacons, magistrates, or town-council. Divers judgments of the lords touching elections

ent

of magistrates
and town-
council.

ent to annul the election so made, and to prefer the other sett of magistrates and town-council. They likewise found, That, in the election of deacons, the honorary members of the respective corporations, *i. e.* gentlemen received into the same, tho' knowing nothing of the business of the trade, ought not to be counted. And farther, that it was necessary, that counsellors should be inhabitants of the borow. But that, conform to the sett of the borow, the counsellors, or the major part, needed not be yearly changed; for indeed, by the sett, they were for life in the burgh of Inverkeithing, concerning which the above questions occurred.

9. The jurisdiction of borow-courts equal to that of sheriffs in civil cases, and likewise in criminal, where the borow is sheriff within itself; but even in such case, the sheriff has a cumulative jurisdiction; how far verbal citations good before them; who sit judges.

THE magistrates of borows-royal have no inconsiderable jurisdiction, whether in civil or criminal cases. In civil they have the same jurisdiction within the liberties of the burgh, as the sheriff within the shire; and in criminal likewise, in such burghs as are sheriffs within themselves, as Edinburgh, and other borows. The baillie-court of burghs sits in vacation-time, in the same manner as in time of session: and this is the case of sheriff-courts by the late act^a. The borow-laws^b, customs and usages of burgh, are their rule of judging and procedure, as well as the general laws of the kingdom, from which they are, in some cases, exceptions. By special statute, the execution of summonses before all courts, as well inferior as superior, ought to be in writing^c. The custom of burgh indeed, for ordinary, is to allow of verbal citations; but decrees in absence, proceeding on such citations, are void^d: however, if the party compare, and do not object, the procedure cannot be challenged on that head. But the court of session have found, that the statute, appointing citations before inferior courts, to be on 15 days^e, has run in desuetude^f; and indeed it is never practised, the citation being commonly to the next two following court-days. Sheriffs, as just hinted, have a cumulative jurisdiction with the burghs within their respective counties, even where the borows are sheriffs within themselves, that being only understood with reference to certain points of criminal jurisdiction, not competent to other burghs: for this reason sheriffs have mostly their seats of judicature in royal-borows. The provost, who is the highest officiar within burgh, may sit and judge; and, in some statutes, he solely is mentioned as the judge^g. And in trials for capital crimes, in baronies belonging to the borow, he alone sits judge, but, for the most part, in other matters, the baillies officiate. In some borows, as Edinburgh, there are four baillies, and in all two. And in some towns there is no provost, as Pittenweem, &c. One baillie may sit and judge alone; and they usually take it by turns.

^a 20 Geo. II.
^b P. 1469.
^c 29.

^c P. 1540.
^c 74.
P. 1681. c. 5.
^d June 17.
1624. Crawford. July 25.
1626. Dickson.
^e P. 1621.
^c 19.
^f Fount. Dec. 25. 1707.
Balfour.

^g P. 1457.
^c 76.

10. Of old the lord chamberlain had the chief oversight of the borows; his decrees equal to those of the parliament. His office in his chamberlain-circuit. This office and

THE lord chamberlain had the chief oversight of the burghs. The decrees before the chamberlain-court were final, and said to be of the same force as if given by the parliament^h. But this court, and the office of high chamberlain, are long since antiquated, and the heritable offices of chamberlainry are declared void by statuteⁱ. While the lord high chamberlain's court subsisted, the magistrates were answerable to him for their management; and complaints against them, and all craftsmen, and other burgessees, were to be laid before him, at his chamberlain-airs or circuits. And he was in these likewise to enquire into their application of the common good of the burghs.

^h Cur. burg.
^c 2.

ⁱ P. 1597.
^c 242.

^a Leges Malc.
II. c. 4. iter
Camerarii,
c. 4. et seqq.
P. 1491.
c. 36.
^b P. 1487.
c. 105.

burghs. His salary was made up of the escheats of the burgessees, and dues exigible by him out of the borows^a; and he is mentioned among the judges ordinary next to the Justice-general, in an old statute^b.

court long
since anti-
quated.

^c P. 1707.
c. 8.

^d Jan. 20.
1681. trades
of Burnt-
island.
^e B. 1. tit. 2.
§ 7. b. 2. tit.
3. § 71.

It was the prerogative of our kings of old to erect borows-royal, with the privilege to create Deaconries or corporations of trades within them, which have exclusive privileges; so that none can exercise the same, except those who are admitted freemen of the trade. I apprehend, that such, being a monopoly, cannot now be granted without an act of parliament. And further, our borows having their number of representatives in parliament ascertained to 15 members, according to their respective districts^c, no royal borow can be now erected; for that were an infringement on their privileges. A borow may use the foresaid privilege; and create deaconries or not, as they find expedient^d. I have had occasion to speak more than once of matters concerning royal borows^e.

11. The case
of deacon-
ries; can
royal borows
be erected at
present.

T I T. XX.

Guild-Courts.

^a P. 1593.
c. 184.

^b Cap. 33, 34,
35.

THERE is chosen yearly, in many borows, a Dean of guild, who, with his council, has power to decide in causes between merchant and merchant, or merchant and mariner. This court proceeds summarily, and was instituted after the example of certain trading cities in France^a. Guild, or Gild, signifies a society or company of merchants; but truly it was understood with us of the whole community of the borow, as is plain from divers of the statutes of the guild^b, if credit is to be given to them. But thereafter it came to be applied to that particular court, consisting of a dean of guild and his council; and to the guild-brethren or merchants.

1. The insti-
tution of
guild courts,
after the ex-
ample of
trading ci-
ties in France;
the import of
guild.

^c P. 1681.
c. 16.

^d P. 1698.
c. 28.

THIS jurisdiction of the guild must be understood consistently with the jurisdiction of the high-admiral, expressly established to him by statute in all causes maritime^c; but other causes touching merchandize may be cognosced in that court. This court has likewise the sole jurisdiction in regulating buildings within borows, whether in repairing or taking down and rebuilding old buildings, or erecting new ones. They are to take care that the streets and common passages of borows be not thereby prejudiced or obstructed, nor the property of neighbouring heritors encroached upon, and that the new buildings be conform to the regulations in the statute for that purpose^d. Without their warrant obtained, upon citation of all parties having interest, no houses within borow can be built or demolished in whole or in part. The order of the dean of guild-court, in these cases, is termed a Jedge and Warrant. It contains the limits or dimensions of the houses, or parts of them to be demolished, built, or repaired.

2. This court
cognosces in
causes be-
tween mer-
chant and
mariner, but
not to en-
croach on the
jurisdiction
of the lord-
admiral. It
regulates
buildings
within the
borow, and
grants jedge
and warrant
for that pur-
pose.

^e P. 1663.
c. 6.

To prevent the decay of policy within royal borows, and the deformity of them by ruinous tenements, it is provided by statute^e, That where houses have been ruinous, and on that account uninhabited for three years, it shall be lawful for the magistrates to con-

3. The pro-
cedure in
respect to ru-
inous houses
within bo-
row, in or-
deen

der to their being rebuilt by the heritor; and, on his neglect, sold for that purpose.

veen before them the parties concerned, to hear them decreed to repair or rebuild such houses within year and day. And, on their neglect or refusal, such houses may be valued by order of the magistrates, by sworn valuers, and sold at the price so set upon them. If the persons interested are known, and have made up a title to the houses, the price must be paid to them; but otherwise it must be consigned in the hands of one of the magistrates, or dean of guild, to be made forthcoming to all parties having interest. If no buyer appear, it is lawful to the magistrates, after apprising the houses, and payment or consignment of the price, to demolish the same and build them anew. The right granted to the purchaser by the magistrates is declared a perfect security to him and his successors. All persons concerned in such houses, if known, must be cited to the above purpose personally, or at their dwelling-houses, and by open proclamation at the parish-church, or market-cross of the borow, and all others, both at the market-cross and parish-church foresaid, by an Edictal citation. This act was made after the example, and almost in the very same terms of an act of one of the rescinded parliaments^a.

^a P. 1644.
c. 35.

4. Where houses within borow, liferented, are ruinous, or like to become so, what is the heritor to do to preserve the subject.

HERITORS of ruinous lands liferented, which are either uninhabitable, or in a short time may become so, are intitled to pursue the liferenters before the magistrates, to hear them ordained to repair or rebuild the same, within year and day after they shall be required by the heritor; or otherwise that it shall be lawful for him to enter to the possession, and repair them himself. When the heritor enters to the possession, he must find sufficient security in the borow to pay termly to the liferenter what the houses were worth of yearly rent in their ruinous state, before reparation or rebuilding the same, during his lifetime^b. In this action the present condition of the houses, and their yearly value, must be summarily cognosced by an inquest of the neighbourhood. In all those cases, tho' the decrees authorising the sale, building or repairing of ruinous houses, must be taken before the magistrates, yet the obtainers of the same cannot put them in execution by actual building or repairing, without the dean of guild's jedge and warrant for that purpose, after citation of the neighbouring heritors, who may thereby be prejudiced, in borows where there is such jedge.

^b P. 1594.
c. 226.

5. The decrees or warrants of the dean of guild-court; the review of them.

THE jurisdiction of the dean of guild is distinct, and several from that of the provost and baillies, not subordinate to them. And therefore his warrants or decrees are not liable to any review before the magistrates, who cannot in the least intermeddle therein; but they are subject to the controul of the court of session, who may give remedy by advocacy, suspension or reduction^c.

^c July 21.
1637. Adamson.

6. What if a tenement is built pursuant to a jedge and warrant, encroaching upon a neighbouring heritor.

IF a tenement or house is quite built and finished, in consequence of a dean of guild's warrant, and conform thereto, the court of session, upon a review of such decree, will hardly ordain its demolition, *Ne urbs ruinis deformetur*, That the borow may not be deformed by ruins; but will rather award damages to the party hurt by the wrong sentence. However, if the party's interest and property be very much violated thereby, and that he is not to blame, as being minor, or out of the kingdom at the time, the other party may be obliged to

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to take down the house, so far as it encroaches upon his property, or prejudices a servitude competent to him upon the ground, or in the use of his neighbouring tenement.

IN some borows there is no dean of guild. In such case, those matters that belong to the dean of guild-court are within the cognizance of the magistrates with advice of the council, to whose jurisdiction that of the dean of guild is understood to be annexed, when, by the constitution of the borow, no separate guild-court is established.

7. Where there is no dean of guild, the magistrates and council exercise that jurisdiction as annexed to them.

T I T. XXI.

The Lord Conservator's Jurisdiction.

THE royal borows have great privileges in relation to trade and commerce, confirmed to them by several statutes, of which the staple-contract with the town of Campvere and states of Zealand, concerning their trade to the Netherlands, is none of the least. By this treaty All such goods of the product of Scotland, as are declared Staple-goods, may be imported into the staple-port of Campvere, where the borows have a factory established, free of all duties and customs payable there. And which privileges cannot be communicated by the borows to strangers; nor can the Scots import their goods into any other than the staple-port: and it is specially declared what goods shall be deemed staple, by the third article of the contract hereafter mentioned.

1. The origin of this jurisdiction a contract between the convention of borows and states of Zealand: the nature of the corporation erected pursuant thereto.

^a P. 1579.
c. 96.

THOSE who have the privilege of this contract, are erected into a corporation by statute^a, and none but Scotsmen can be admitted into it; and the corporation, or staple-factory, is subject to our laws, and within our king's Legiance, tho' locally in the Netherlands. As the treaty was made with the convention of borows, so they make acts for regulating the trade of the corporation to which they are bound to submit; so far as they are not contrary to the articles of the contract, or public laws of the kingdom.

2. The qualifications of those intitled to be received into this corporation; the convention make acts for regulating the trade of the corporation.

^b P. 1597.
c. 63.
P. 1503.
c. 81.

FOR preserving those privileges from violation, and to put the several statutes of parliament, or acts of borows thereto relating in execution, there is a Conservator of our privileges in the Netherlands^b, who, in some statutes, is called Conservator of Scotland. He is appointed by the sovereign, and is likewise made his majesty's Resident in the 17 provinces of the Netherlands. And if public encroachments be made upon the privileges, he must represent the same to the king. Notwithstanding that his commission is from the king, yet he is admitted by the convention of borows; who, upon presenting his commission, are wont to protest That it shall not prejudice their right to name the conservator.

3. A conservator appointed by the king for preserving the privileges of the corporation.

BEFORE the conservator or his depute, and their court in Campvere, all suits between Scots merchants, in those foreign parts, must be discusst; and he is judge as to all private encroachments upon our privileges, with respect to unfree traders, or the like; and must put the

4. The nature of the conservator's court. His office is for life; he may

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be deprived by the lords of session for malversations, in a proper action for that purpose.

the law in execution against them; and if he suffer abuses, and, for his own profit, allow goods coming from foreign parts to be entered in the staple-port as belonging to Scotsmen, of the growth of this country, it is a malversation, and will subject him to deprivation^a. The office of conservator is for life; and therefore he cannot summarily be removed on pretence of malversations. He holds his office by the same laws as other judges within the kingdom, who have commissions for life, do theirs. Therefore such malversations must be cognosed by the proper court here, which is the court of session, before he can be deprived^b.

^a Jan. 16. 1708. Sir Alexander Cuming.

^b Jan. 3. 1706. Sir Andrew Keunedy.

5. The conservator's salary; he is answerable before the convention of borows, in complaints against him.

THE conservator has an yearly pension from the town of Campvere, but the greatest part of his salary from the king; and receives his instructions and the rest of his salary from the borows, and is answerable before their convention in any complaint against him, at the instance of private parties, for injuries done them under colour of his office. And that all persons may have access to prosecute him before competent courts here, he is bound to come into this country yearly; or empower a responsible procurator to answer for him in such complaints or pursuits^c. And he may, if he pleases, reside here, and officiate by his deputies abroad, as the present lord conservator does.

^c P. 1503. c. 82. July 27. 1710. Kennedy.

6. The origin of the Scots privileges in Zealand, and method of continuance thereof.

THE occasion of the Scots settlement at Campvere is said to have been a marriage of a daughter of James I. to the lord of Campvere, *anno* 1444^d. It is established by a staple-contract, between our convention of borows, ratified by our king on the one part, and the magistrates of the town of Campvere, ratified by the states of Zealand, and the lord of Campvere, on the other part; and the privileges thereby conferred to Scotsmen are confirmed by the several statutes above referred to. A solemn contract was entered into, or rather renewed, between the above parties, consisting of 39 articles, by the penult of which it is declared, That the continuance of the Scots staple at Campvere shall be for the space of 21 years from the date thereof Fixt, and thereafter so much longer as the royal borows and the town of Campvere shall agree together^e. And accordingly it has been renewed from time to time since, as it was in former times, and their privileges augmented, as may be seen in the account of the same, premised to the contract just mentioned; and as it has been continued for some centuries, there is little or no doubt of its being still prolonged. This was lately done in the year 1748, and the ratification of his most Serene Highness the late Prince of Orange, as Marquis of Campvere, obtained thereto^f.

^d Staple contract, &c. printed anno 1749. p. 3.

^e Decem. 25. 1697.

^f Ib. p. 82.

7. The extent of the conservator's jurisdiction in civil or criminal cases. No suspension or advocacy of the proceedings before his court.

I SHALL only take notice from that contract, That it is provided That the lord conservator may exercise jurisdiction in all civil, and in ordinary criminal matters, over the persons and goods of all those who belong to the Scots staple, and over all Scotsmen dwelling within that town, or liberties thereof, exclusive of the magistrates or judges of Campvere, and the sentences of the conservator's court shall be final, without contradiction or appeal^g. So that it would seem that the proceedings before that court are neither liable to advocacy or suspension here. And it is also provided, That if any of the Scots nation, belonging to the staple-court, or having dependence thereon, commit

^g Ib. art. 4. p. 17.

commit a capital crime, even treason not excepted, for which he shall suffer death, or demembration, his goods shall not be liable to forfeiture or confiscation, but the same shall remain free to his heirs or executors ^a. There is no doubt, but for such public crimes the offenders are liable to be judged by the municipal law of the place; but, as to trespasses or private crimes, the conservator's court has an exclusive jurisdiction; and, by a statute with us, the conservator is particularly vested with authority to judge in cases of usury ^b.

^a Ibid. Art.
11. p. 27.

^b P. 1579.
c. 262.

THOSE privileges being established by a Commercial treaty between our royal-borows and a foreign state, continue the same as before the union, since they do not influence the duties upon export or import, which must still be answered here. And, by the same rule, such goods as are, or shall be prohibited to be exported by the British laws, cannot be deemed staple-goods, as wool, &c. for these must be subject to the laws of Britain. And, by an express article of the union, the rights and privileges of the royal-borows of Scotland are declared to remain entire, notwithstanding thereof ^c.

^c Art. 21.

It is observable, in the last place, that, by statute, it is ordained, That the conservator have six, or at least four of the best merchants to sit with him, who shall have the same power as he to administer justice ^d. But such assessors, in ordinary cases, are not adhibited; but, upon extraordinary occasions, the conservator, or his deputy, calls such to his assistance; and, in that case, the decree runs in his name, With consent of his assessors.

^d P. 1503.
c. 81.

8. How far
the privi-
leges by this
staple con-
tract varied
by the union.

9. How far
the conserva-
tor bound to
have assess-
ors.

TI T. XXII.*Ecclesiastical Jurisdiction.*

HAVING discussed the jurisdiction of civil courts, I proceed to that of Ecclesiastical, which, for most part, is derived from the temporal powers. The National Church is a great body politic, as I have shown elsewhere ^a; and consequently all the authority and jurisdiction they are intitled to exercise in this, or any other country, is derived from the sovereign power of the nation where they are established. In which sense the king, (or other sovereign power) as the fountain of all jurisdiction, may justly be denominated Head of the National Church. And the jurisdiction of the clergy, in that respect, so far as concerns the exercise of the same in this country, is of the nature of a civil right. But, as to their spiritual powers, the same are derived from an higher fountain, viz. the Divine Founder of our holy religion, by the promise given to his Apostles ^b. This must extend to their successors, that being the implied quality of the grant, which is to the end of the world; and no sovereign ever pretended to such powers, and much less to confer them upon others. This, I conceive, is the only meaning of the Intrinsic power of the church; and, in this sense, it is justly declared by our legislature, that CHRIST alone is the head of this church ^c; which is the dictate of the great Apostle, who calls the church the Body of CHRIST, and CHRIST its Head ^d, meaning, in a spiritual sense, the church Universal; For it cannot be understood of a national church, our SAVIOUR

^a 1. tit. 2.
§ 25.

^b Mat. xxviii.
19.

^c Confes. of
faith, c. 30.
confirmed by
P. 1690. c. 5.
^d 1 Cor. xiii.
27. Col. i. 18.

1. How far
the jurisdic-
tion of the
church deriv-
ed from the
civil powers.

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himself having expressly declared, *That his kingdom is not of this world*^a. If a noted author^b had adverted to this distinction, he might have spared a great deal of his invectives against the clergy; for, to be sure, they cannot be found fault with for using the powers, either inherent to their office and spiritual character, or granted to them by the legislature; and it is only the abuse of the one or the other that can be blamed. And no doubt a national church has a right to make rules for their government, in order to answer the end of their original institution, in respect to the exercise of their spiritual powers; or their establishment as a national church: in the same manner as any other body politic has to make by-laws; provided always the same be not inconsistent with the rules in the Scripture, or laws of the nation, upon both which their being is founded. But no church has any concern with those who are not of their communion; *What have I to do to judge* (saith St. Paul) *those who are without, whom God judgeth*^c?

^a John xviii. 36.
^b Rights of the Christian church, printed an. 1709.

^c 1 Cor. v. 12, 13.

2. A minister settled contrary to the patron's presentation, hath no right to the stipend.

I HAVE already treated of ministers stipends, and their settlements in parish-churches^d; and shall only add, That since the act, establishing presbyterian church-government, expressly ordains, "That the presbyterian ministers shall have right to the maintenance, and other privileges provided to the ministers of CHRIST's church within this kingdom, As they are or shall be legally admitted to particular churches^e;" it naturally follows, that, by the law, ministers being to be admitted upon presentation from the lawful patron^f, one that is settled minister of any parish-church, in opposition to the patron's presentation, hath no right to the benefice or stipend; because he is not Legally admitted. And accordingly, in a question between the patron and a minister so settled, the court of session preferred the patron to the rents of the benefice, as being in that respect still holden as vacant stipends^g.

^d B. 2. tit. 8. sect. 5. sect. 10.

^e P. 1690. c. 5.

^f 10 Annæ, c. 11.

^g June 26. 1751. Cochran against the heritors of Culrofs.

3. Such minister not to be deemed minister of the parish, in a civil consideration, nor a minister of this church.

It may be a question, Whether the minister's pastoral relation to the parish, in such case, still continues, notwithstanding he be deprived of the stipend; and, if it does, how shall he be supported? I humbly think, that since none but such as are legally admitted to a particular church, can have right to any of the privileges consequent thereon, such minister cannot be deemed to have any interest in that parish-church, nor is intitled to hold church-sessions there, or to act in any other capacity as a minister of this national church. He holds indeed the orders conferred upon him by his ordination, and therefore is a minister of the universal or catholic church; and to be regarded only in the same light, as any bishop or other foreign Ecclesiastic, while in this country: for, as to what concerns the pastoral relation, I know no such thing in a civil consideration. He may hold the charge of the people, who shall submit to his ministry, in the same manner as the Apostles and their successors did, before any nation embraced the Christian religion; or as the Seceders do with us at this day, and must be maintained by such as adhere to him. For *He who feeds a flock, must eat of the milk of the flock*, according to the judgment of St. Paul^h.

^h 1 Cor. ix. 7.

4. The course taken by our clergy and

OUR clergy were very circumspect during the schism of the Romish Church, when two persons, and sometimes three, claimed severally

* Anno 1345.

verally the title of St. Peter's Successor. It began between Urban VI. and Clement VI.^a and continued for 71 years. Our clergy did not declare for any of the competitors, nor directly disclaimed any of them, but appointed a Conservator of the clergy, to whom appeals were made, against judgments given by the bishops, or their officials, and he, with advice of his council, determined the same. And if the party, against whom the judgment was given, did not acquiesce to the same, he might appeal from it to the General Assembly of our church, before whom all complaints, against the sentences of inferior spiritual courts, were finally decided, without troubling themselves with the See of Rome, in those times of confusion. But this wise conduct met with difficulty. The party, that conceived himself lesed by the sentence of the general assembly, frequently appealed to one or other of the Anti-pope's, which rendered the jurisdiction of the conservator and assembly fruitless. To remedy this inconvenience, our legislature interposed, and expressly ratified and established the authority of both the conservator's court, and of the general assembly, to the above effect, while the schism should continue; and enjoined all justices, sheriffs, and other the king's ministers of the law, to give their aid in executing the same, without regard to any such appeals to one or other of the contending popes^b. If they had still continued upon the same foot, they had been a national church in a proper sense, a character which those who acknowledge a foreign power for their head cannot well maintain.

legislature, during the schism of the church of Rome.

^b Stat. Rob. III. c. 6.

c B. I. tit. 8. § 31, &c.

^d P. 1443. c. un.

I HAVE observed elsewhere, that our kings were most tenacious in preserving their prerogative against the usurpations of the popes^c. And farther, they were most religious in maintaining the freedom of the holy church and churchmen, against all violences, by repeated statutes. And indeed, our parliaments of old did frequently begin with acts in favour of the church; and I find, that a parliament was called of purpose to make an act in their behalf, which was all they did^d. It ordained, That all breakers of the freedom of the church should be prosecuted with process of cursing, (excommunication) and should be disabled to sue or defend in any action, till they assythed (indemnified) the party wronged, and obtained absolution in form of law.

5. The king's prerogative, and freedom of the church maintained.

I SHALL now more particularly remark, how ecclesiastical jurisdiction was exercised with us in times of popery and episcopacy, and likewise in times of presbytery of old, and at this present. The popish ecclesiastical courts did not only judge those of the Clergy in all cases, on their pretended exemption from secular powers; but likewise assumed jurisdiction over the Laity, in crimes, in order, as the pretence was, to reclaim the offenders by spiritual censures; and, in civil matters, to compel them to perform their engagements; a failure in which they accounted a mortal sin, and therefore of a spiritual consideration. Their proper executorials, or means of execution of their sentences, were only church-censures, of which excommunication was the highest; but they used the aid of the temporal power for other severe penalties. And our legislature was excessively indulgent to them in that respect, as shall presently appear.

6. The extensive pretensions of spiritual courts in times of popery.

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7. Church-discipline abused to bad purposes in popish times, by the severe temporal pains consequent upon their sentences.

CHURCH-DISCIPLINE, exercised in the ecclesiastical courts, is an excellent remedy for the diseases of the soul, if duly applied; but when used as a handle of oppression, to the destruction of mens lives, or ruin of their estates, under pretence of care of their souls, it becomes an Abomination. Thus, in all cases, if one remained under the Process of Cursing (as the sentence of excommunication was called) 40 days, all diligence, by the aid of the secular power, followed against his person and estate; and, if he continued in the same condition for one year, his whole moveables became escheat to the king^a.

^a P. 1449.
c. 12.
P. 1535. c. 9.

8. The cognition of heresy belonged to the ecclesiastical courts. The case when a temporal punishment was to be inflicted.

HERESY, in those days, was accounted a most heinous crime, as a departure from the church, and throwing off its authority. The cognition of it was peculiar to each bishop in his diocese, by our law, as the canons direct; and, if occasion required it, the secular power was called in support of the church^b. Of this we had some melancholy instances at the dawning of the reformation; when, pursuant to the sentence of the church, the professors of the reformed religion were committed to the flames by the secular judge, as our historians inform us.

^b P. 1427.
c. 28.

9. The same course followed after the reformation, even during presbytery; with this difference, that excommunication was used by the popish clergy, on secular grounds, which was not practised after the reformation.

THE above procedure, upon the sentence of excommunication, was introduced For maintenance of the freedom of the holy church, as the statute 1449 suggests; so that it might be thought, that it was occasioned in compliance with the usurped authority of the court of Rome: but the same procedure is authorised by an express statute, after the reformation^c. By this act, if any remained under sentence of excommunication 40 days, letters or writs were to be directed, at the instance of the king's advocate, or procurator for the church, against the party, to satisfy the sentence, and be reconciled to the church, under pain of rebellion, and putting him to the horn; and, pursuant thereto, letters of caption might be issued, in the same manner, as was authorised in times of popery, by the act just quoted. The only difference is, That, before the popish ecclesiastical courts, process and sentence of excommunication was competent upon civil causes, as appears from the statutes above referred to, which certainly was most absurd; but this could not be the case before our reformed ecclesiastical courts, especially in times of presbytery, when this act 1572 was made. And, by another act likewise under presbytery, If any excommunicated person entered the church, the time of administering the sacraments or prayers, he might be charged by the minister to remove. And, if he refused, he might be apprehended, after the service was ended, by those present, at the minister's request, and delivered over to the judge-ordinary, who was bound to commit him to prison, till he found bail to be reconciled to the church, and make amends for the offence. And, if he deforced any of those that offered to apprehend him, his moveables became escheat to the king, and his person was to be punished at his majesty's pleasure^d.

^c P. 1572.
c. 53.

^d P. 1587.
c. 27.

10. In times of episcopacy, the effects of excom-

AND, in times of Episcopacy, the effects of excommunication were still more pernicious; for, by special statute, no person, excommunicated for not conforming to the religion professed in the kingdom,

dom, could possess his lands or heritage holden of the crown ; but the rents of the same were to be intermeddled with, and collected for his majesty's use. Nor were they to be received as vassals in their lands, by charters of resignation or confirmation under the great seal ; nor infest as heirs to their predecessors, while they remained in that state^a. And farther, the person excommunicated, after remaining 40 days under it, might be proceeded against, as is before mentioned to have been the case in times of popery^b.

munication still worse ; one under it could not be infest in his lands.

^a P. 1609.
c. 3, 4.

^b P. 1661.
c. 25.
P. 1663.
c. 23.

^c P. 1690.
c. 28.

^d P. 1695.
c. 13.
P. 1696.
c. 31.

^e 10 Annæ,
c. 6.

BUT, upon the revolution, when presbytery was restored, these, and all other acts enjoining civil pains or disabilities, upon sentences of excommunication, were rescinded^e. However, still the civil magistrate interposed to enforce obedience to acts and ordinances of church-judicatories, in order to sentences of excommunication, and execution of the same ; and in this practice they were authorised by statutes^d. And therefore the British act was of no small use, which not only declares, That no civil pain, forfeiture, or disability, shall be incurred by the sentence of excommunication ; but likewise expressly prohibits and discharges all civil magistrates to force or compel any person to appear before any church-judicatory when summoned ; or to give obedience to any such sentence of excommunication when pronounced^e.

11. Upon the revolution, these severe penalties abolished ; but still the civil magistrates compelled obedience to church-censures, till the British statute, which prohibits them to be assistant in that respect.

WHEREFORE church-judicatories are now limited to their just bounds, and reduced to their primitive state ; so that they have only power to inflict church-censures. And as they are incompetent to impose any civil pains, so none are consequent on their sentences. Church-discipline was only intended to reclaim sinners to their duty, by methods of conviction, and not to compel them to an hypocritical submission and compliance. And the exposing persons in the state of penitence, in a public manner, with a distinguishing habit, and in a particular place of disgrace in the church, to make profession of repentance for their immoralities, has no good effects, and ought not to be imposed, unless the delinquents freely offer themselves to undergo it, as we are informed was the case in the primitive church. This, with submission to the reverend fathers of the church, were more conducive to the success and just influence of their censures upon the conscience of offenders, in order to reform them, and is according to the spirit and intention of the British statute just referred to. If such measures were followed by national churches, there would be no ground for the bold exclamations of the foresaid author, against the power of the clergy, in respect to excommunication^g.

12. Church-judicatories now limited to their just bounds, and have sufficient powers still to answer the true intent of church-discipline.

^f Euseb. lib.
5. c. 28.

^g Rights of
the Christian
church, pref.
and c. 3.

^h Instructions
to the com-
missars 1666.

DURING episcopacy, the bishops, by their commissars or officials, exercised jurisdiction conferred on them by the legislature, in certain temporal matters, viz. in all causes concerning benefices and tithes, causes testamentary, actions of adherence, declarators of the nullity of marriage, and in cases of bastardy and divorce^h. Many of these are cognoscible by the Commissars, who succeeded in the room of the bishops officials, but are now independent of the church ; and our church-judicatories have no concern in any of them, or other civil matters. But our ecclesiastical courts have still jurisdiction com-

13. The church has a native power to determine ministerially in matters of faith ; and to judge in other things wherein they are authorised by the confession of

faith, made
our standard
by act of par-
liament.

petent to them to determine ministerially casuistical points, and to set down rules for the better ordering the public service of religion; and to determine complaints in matters of scandal, in order to church-censure; and to cognosce in the settlement, deprivation or suspension of ministers, and other points of ecclesiastical government^a. This, I observed in the entry, belongs to them, partly as a body politic, established by the sovereign power; and partly in the exercise of their spiritual powers over those who submit themselves thereto, or are of their communion.

^a Confession
of faith, c. 29,
30. ratif.
P. 1690.
c. 5.

14. The pow-
er of the
church as to
heresy; an
heretic, who.

As to heresy, the church-judicatories frequently pass judgments touching it; but at the same time, by the confession of faith, established as the public standard of this church^b, it is declared, "That all councils since the Apostles days may err, and have erred, and that therefore they are not to be made a rule of faith or practice, but only to be used as a mean in both." And indeed this is a principle founded in human nature, all men being fallible, and which is verified by the experience of all ages. The consequence is, That tho' a person, adjudged an heretic by church-judicatories, must, for order's sake, be holden as such; yet they having no power to form articles of faith, which, to be sure, can only be founded on the sacred oracles of truth, he may, notwithstanding, be orthodox in reality, soundness of faith depending upon its agreeableness to the principles laid down in the scriptures, without regard to human institutions or compositions.

^b P. 1690.
c. 5. confess.
c. 30.

15. The use of
confessions of
faith, or pub-
lic standards
of religion;
how far are
they a rule of
faith to sub-
jects.

To examine a little into the use and intent of public standards. Our confession of faith, authorised by the legislature, must be considered as the fundamental articles, constitutive of the national church as a body politic, to which all that claim to be members of it must give obedience, in the same manner as the members of any other corporation must to the rules established in their erection. And whoever contraveens the same by ouvert acts, is liable to the pains or disabilities provided by law, in the same manner as in other cases of the like kind. Thus the clergy, who subscribe to the observance of them at their admission to pastoral charges, must conform thereto in their doctrine; or otherwise may be deprived from the exercise of their ministerial function in the national church, as any member of another corporation may be thrown out upon his infringing the conditions of his membership. But such standard can never be intended to regulate the faith or principles of the subjects; nor can there be any penalties inflicted upon them for differing in opinion from the same; for the political law of a nation has no concern with the inward sentiments or dispositions of the mind. *Cogitationis pœnam nemo patitur*^c, None can suffer any punishment on account of his thoughts; which dictate of the civil law is founded in nature. And indeed such standards cannot be regarded as a plan of faith to the subjects, unless the principles laid down by the noted Mr. Hobbes should hold, viz. "That the books of the holy Scripture are only canonical when established for such by the sovereign power^d;" and "That none is obliged to obey them by any other authority^e;" and "That every man ought to observe, for the rule of his faith and practice, that doctrine which the sovereign hath commanded to be taught."

^c L. 18. ff.
de pœnis.

^d Leviathan,
P. 199.
^e Ib. p. 205,
271, 281,
&c.

Positions

Positions absurd! yea, monstrous at the very first sight! And which plainly tend to undermine all morality, and unhinge natural as well as revealed religion, and lead directly to atheism, as inverting the dictate of nature, which is the foundation of all morality and religion, *That we ought to obey God rather than men*, as is justly urged by the Apostles, against obtemperating the command of the Jewish Sanhedrim, to desist from executing their divine commission^a. If those inspired guides to divine truth had really formed the Creed, which vulgarly goes under their name, it would have been an infallible rule; but that not being the case, the Oracles of truth are the only standard for mens faith in religious matters.

^a Acts 5, 29.

^b P. 1690.
^c 5.

By the act 1592, to which reference is had as the rule in the act 1690^b, restoring presbytery in this country, It is declared lawful to the church, and ministers thereof, to hold General Assemblies once in the year, or oftner, *pro re nata*, i. e. as occasion or necessity shall require. And that if the king's commissioner be present at the assembly, he shall appoint the time and place of the next assembly; but otherwise the assembly shall do it themselves, it not being thought reasonable that the same should be obstructed by the absence of the king's commissioner; nor is the royal sanction requisite to authorise their acts.

16. The general constitution of our church.

THE privilege here granted to the general assembly, to appoint its own meetings in the above case, and that their acts shall be good without the royal assent, is higher than the church in the Roman empire, which was their national church, was indulged in antient times. For the Oecumenical councils were called by the emperor's authority, and their decrees and canons behoved to be authenticated by him or his commissioners^c; and which decrees the emperor Justinian enjoins to be observed, as of equal authority with the holy scriptures^d.

^c Bower, hist. of the popes, vol. II. ad an. 451. p. 96.
^d Novel. 131. c. 1.

To return to the constitution of our church. The government of it is, in the first place, by Church-sessions, one in every parish, made up of the ministers, and certain discreet persons, laymen, ordained to the office of Ruling-elders: this is the radical judicatory. 2. Presbyteries, to whom appeals or references lie from church-sessions: they consist of the ministers of a certain district, and of one ruling-elder, from each church-session within the bounds of the presbytery. 3. Provincial synods, made up of the several presbyteries within a province. The ancient Dioceses of the bishops were generally the limits for synods; but where the diocese was large, it was divided into two, or perhaps three synods, in convenient places, for the ease of the ministers^e. And lastly, the General Assembly, consisting of certain ministers and elders from each presbytery, and from the royal borows and universities^f. Church-sessions may be holden as oft as occasion requires, for cognoscing in matters of discipline, and other things of ecclesiastical cognizance, within their sphere. Presbyteries are commonly holden once each month, and review the proceedings of church-sessions regularly brought before them, and determine other matters of ecclesiastical consideration. Synods are to be holden twice in the year, viz. in April and October^g; and decide in appeals or references from the respective presbyteries within their province. And the general assembly regularly is holden once in the year, for most part in May.

17. The oecumenical councils; their authority with the Romans.

18. The several church-judicatories by the present establishment; and the respective powers of church-sessions, presbyteries, and synods.

^e Ja. VI. P. 21. c. 1.

^f Dd. P. 1592. c. 129.
^g P. 1690. c. 5.

^h D. Ja. VI. P. 21. c. 1.

19. How far the management of the poors money belongs to the church-session.

It was lately much controverted, Whether the church-session of a parish had jurisdiction exclusive of the heritors, in the management and distribution of the collections at the church-door, and of other funds for the use of the poor? And the court of session found, That the heritors of the parish had decisive votes, in such case, jointly with the members of the session; without prejudice to the church-session as to the management of the collections for ordinary occasions^a. Which is consequential to the heritors, and their tenants being burthened with the maintenance of the poor, in default of charitable funds, the one half of which expence is to be born by the heritors, and the other by the tenants^b. This jurisdiction is not only founded in the nature of the thing, in respect of the concern the heritors have in the support of the poor; but likewise is supposed to be the case in divers proclamations of the privy council, ratified by act of parliament^c. By these the deficient, in payment of the quotas laid on for the subsistence of the poor, are liable in the double, if they stand suit. The smallness of the sums made this expedient necessary.

^a Feb. 15.
1751. heritors of Humby.

^b P. 1663.
c. 16.
P. 1672.
c. 18.

^c Proclam.
Aug. 11.
1692. Aug.
29. 1693.
ratified
P. 1695.
c. 43.

20. Our general assembly has a constitutive power in making canons, and a judicative capacity in determining causes.

THE jurisdiction of the general assembly is either Constitutive, or Judicial. The first consists in making acts and canons, ordering the method of procedure in matters before them, and other affairs touching the discipline and government of the church, in the same manner as other corporations make by-laws. By the second, the general assembly is a Court of Review, as to matters competent to them, and decide in appeals and references brought before them from the subordinate ecclesiastical courts; which chiefly concern church-discipline, by inflicting excommunication, or other censures on offenders, and the ordering settlements of churches; the same being frequently brought before the assembly, where opposition is made by the parishoners to the person presented by the patron, or where they are otherwise divided in their sentiments and affections.

21. How far the character of ministers indelible; by deposition they cease to be ministers of this church.

It is the province only of ecclesiastical courts to suspend ministers from the exercise of the ministry, and likewise to depose them from the function; of both which I have largely treated in another place^d, and shall only add, that as to deposition or deprivation, it may be questioned How far it affects the sacred character? By the decision of the council of Trent^e, it is only a Degradation from the function; but the holy orders still remain with the party, those being holden to impress an Indelible character. This tenet is much impugned by those of the reformed church, and particularly by a late author^f, as inconsistent with the doctrine and practice of the catholic church in primitive times. But at the same time he owns, that the antients held a distinction between a deposed ecclesiastic and a mere layman, viz. That such ecclesiastic is qualified to officiate again without a new ordination, if the church recal him to the office. This is plainly to admit the character to be indelible; for if it did not still remain, a new ordination behoved to be requisite in such case, in the same manner as if he had not been formerly invested with holy orders. And this is the rule in our church; for a minister who is deposed may thereafter, upon reasonable considerations, be restored to the sacred function by the general assembly, without any new ordination, which is never required. But, after deposition, the party is not to

^d B. 2. tit. 8.
§ 220, &c.

^e Sess. 7.
cap. 9.

^f Bower, hist. of the popes. vol. II. p. 212. note A.

to be regarded as a minister of this church, nor intitled to any of the privileges competent to such, even tho' he should be reponed; unless he is again settled in a ministerial charge in this country.

ACCORDING to the foresaid Confession of Faith, church-judicatories are not to concern themselves with any thing but what is ecclesiastical; and not to intermeddle with civil affairs, touching the commonwealth, unless by humble petition in cases extraordinary ^a.

^a D. confes.
c. 31.

WHEN the Episcopal church subsisted with us, the king, by his proclamation, did appoint the time and place of their national synods or assemblies meeting; nor could they treat of any thing but what was authorised under his royal hand; and their canons, acts and ordinances, behoved to be confirmed by his majesty ^b. This limitation was a reasonable precaution in the government, against abuses under colour of ecclesiastical ordinances; for, since there was no appeal against their decisions, it was just, that, before they took effect, they should be ratified by the king.

^b P. 1663. c. 5.

IT may therefore be questioned, how, at present, we are safe against such abuses by our general assemblies; as perhaps they may usurp a jurisdiction that does not belong to them, against which there does not lye an appeal? The answer is, That no execution can follow on the decrees of the ecclesiastical courts, other than church-censure for disobedience; and, if they should presume to intermeddle in civil matters without their sphere, (as it is not to be imagined they will) I do not see but redress will be competent, by suspension or reduction, before the court of session; or a prohibition might be granted, in way of advocacy, inhibiting them to proceed in such matters.

IT is a rule in settlements of churches, That an appeal does not stop the previous steps in order to it, to prevent unnecessary delays in supplying the vacancies, but it bars the actual settlement ^c; because, if a Licentiate or Probationer were ordained minister, and thereon settled Parson of a parish, on that settlement's being reversed by the superior court, he behoved to lose the benefice; but, at the same time, his holy orders would remain with him, and he would perhaps have no means to support it, to the scandal of the church. For this reason the canon law wisely ordained, That none should be created a priest without a benefice; and that otherwise the bishop who conferred the orders must support him, till he be provided with a living, if he has not wherewith to maintain himself ^d.

^c Assembly
1732. act 5.

^d C. 2. 4. ext.
d. przb.

BY the canon law appeals stay'd judicial proceedings before the inferior judges; but, as provisions to benefices were made by the extrajudicial act of the bishop, without perhaps the knowledge of the Patron, or others interested in the benefice, there was no opportunity to appeal, before the benefice was conferred; and therefore liberty was allowed to the party aggrieved to appeal within 10 days after he was apprised of it ^e. After which example, appeal, by our form of proceeding, must be made within 10 days of the judgment given. And tho' an appeal, in other judicial matters with us, stays procedure

^e C. 8. extra
de appell. in
6to.

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22. How far our church-judicatories can meddle with civil affairs.

23. The canons, acts and ordinances of the national synod or assembly, in times of Episcopacy, unless approved by the king, could not take effect.

24. If our church-judicatories should intermeddle in temporal matters, what remedy is competent against their judgment.

25. In settlements of churches the previous steps may be proceeded in, notwithstanding an appeal; but the actual settlement must stop till the appeal be discussed.

26. The course by the canon law in such case.

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ture before the inferior ecclesiastical court, till it is discussed; yet, of old, it did not stop the settlement of a minister, and there was only place to have him removed afterwards upon an appeal; but this, for expediency, was varied, as just related.

27. The time of the assembly's sitting. They appoint a commission to supply their place in the intervals of assemblies.

THE term or continuance of the assembly's sitting is not ascertained, but depends much on the pleasure of the king's commissioner, who is present at all the meetings; but generally it does not exceed 14 days. And because, in that short time, they cannot overtake all the business that comes before them, and that it is expedient to have a constant court to advert to the interests of the church, in the intervals of the assemblies, they appoint a Commission, consisting ordinarily of their own members; tho' they are not limited to them, but may choose other ministers and elders of the church for that purpose.

28. The business of the commission.

THE province of the commission is to take care of the interest of the church upon emergencies, and to decide in the particular causes remitted to them, by their instructions, till next assembly; and they have four stated diets for that purpose, and may meet oftner, if occasions require. Their judgments and decrees, within their powers, are of equal force with the assembly's, and are not subject to review.

29. The procedure before the general assembly and commission, regulated by acts of assembly and principles of reason; and, in the main, founded in the old canon law.

THE procedure before the assembly or commission, and subordinate courts, is regulated by the acts of assembly, and principles of reason and justice. At the same time, I must observe, That their method of proceeding is in the main founded in the canon law, as in part appears from the above observations, and could be further shown, were it not matter of curiosity, rather than useful. The decisions of that law, in cases that have no relation to the papal usurpations, are for most part founded in reason. And therefore its authority, in some cases, is owned in statutes since the reformation^a; and such usages as obtained before the reformation, and had no dependence upon it, were still continued with us, in matters of ecclesiastical cognizance. But to return,

^a P. 1621. c. 18, &c.

30. The procurator of the church, his office most antient and honourable.

THAT the affairs of the church be duly taken care of before the civil courts, so far as concerns their temporal interests, a Procurator for the church is appointed by the general assembly, viz. an advocate of sufficient abilities for that important trust; and to his office, that of the clerkship to the assembly was frequently adjoined; but the offices being distinct, they may be committed to different persons, which is the case at present. This office of procurator for the church appears to be an honourable charge, of antient institution, and to have taken place upon the reformation of religion: for, in a statute soon after that period^b, he is named as then an established officer, and conjoined with his majesty's advocate in the matters therein committed to them.

^b P. 1572. c. 53.

Observations on the Law of England, in relation to the Premises.

1. The spiritual jurisdiction of the

THE ecclesiastical jurisdiction is justly said to be derived from the king; and therefore the king is declared Head of the church; and when

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when such jurisdiction is exceeded, it is subject to the king's temporal courts. The ecclesiastical judges can neither fine nor imprison; for their jurisdiction being regulated by the canon law, their proceedings are only in order to ecclesiastical censures^a.

church is derived from the king. Their courts.

^a Bac new abr. (courts) 610. 618.

If a will is proved in an ecclesiastical court, the executor must sue in the temporal courts, to get in the estate of the deceased. This jurisdiction, in respect to Wills, is confined to such as relate to goods and chattels only, but is not concerned in Devises of lands; but matrimonial causes, divorce, alimony to a wife, &c. and tithes are of ecclesiastical cognizance^b.

2. They prove wills; other matters within their cognizance.

^b Bac. ibid.

THE highest ecclesiastical court is the Convocation of the clergy, called likewise a National Synod; it is convened by the king's writ, directed to the Archbishops of Canterbury and York: each of these assemblies constitutes a kind of Ecclesiastical Parliament. The archbishop, and his suffragans, as his peers, sit together, composing the higher house. The dean, archdean, a procurator for the chapter, and two procurators for the clergy, of each diocese compose the lower-house; in which they choose a Prolocutor, in the nature of a speaker of the house of commons^c.

3. The convocation; it consists of a higher and lower house, after the manner of the parliament.

^c Bac. ibid. 611.

THEIR jurisdiction, at present, is in cases of heresy, schism, and other merely spiritual and ecclesiastical matters. They cannot meddle with particulars relating to the laws of the land, the king's crown or dignity. In those particulars in which they have jurisdiction, they are to proceed *Secundum legem divinam, et canones sanctæ ecclesiæ*, according to the divine law and canons of the holy church. As to the making of new canons, they are to have the king's licence to that purpose; and, when made, they must have his royal assent for putting them in execution, with this proviso, That such canons as were made before the statute of 25 Henry VIII. not repugnant to the king's prerogative, the laws, customs and statutes of the realm, shall be still used and executed as before the making of that act^d.

4. The subject of their jurisdiction. The rule by which they proceed, the divine law and canons of the church; the case of canons ecclesiastical.

^d Bac. ibid.

^e 25 H. VIII. c. 21.

By the statute just mentioned^e, it is declared, That the realm of England acknowledges no laws, but such as have been made in it, or received by common consent and established custom. Here we see a parliamentary declaration, That long use and custom is sufficient to graft foreign laws into the English constitution, or to make them part of the common law of the land; for, tho' they do not oblige by the authority of those who made them, yet, being generally received, they became law by consent of the legislature. And that the whole canon law was not received in England, appears from the famous case of legitimation of children, born before marriage of their parents, for which the clergy vigorously insisted, as being conform to the canon law. But a solemn parliamentary declaration was made to the contrary^f; notwithstanding that pope Alexander III. had very lately before published an express canon in favour of such legitimation. Whence the inference is unavoidable, That no canon nor constitution, made by authority of the pope, did, even in times of popery, bind in England, till it was allowed by act of parliament.

5. The canon law, and constitutions of the popes, did not bind in England, till they were authorized by the legislature. This exemplified in the case of legitimation of children born before marriage of their parents.

^f Stat. of Mort. c. 9. or 20 H. VIII.

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6. Spiritual courts intermeddling with matters of a temporal nature, incur a premunire; the punishment consequent upon it.

To restrain spiritual courts from intermeddling with matters of a temporal nature, the statute of Premunire was chiefly introduced^a. This writ lies, where a cause that belongs to the cognizance of the common law is sued in the ecclesiastical court; and the punishment is severe, *viz.* That the offenders shall be put out of the king's protection, or outlawed, and his lands and tenements, goods and chattels, be forfeited to the king; because such procedure touches the king's prerogative, and deprives the subjects of the benefit of the common law.

^a 16 Rich. II. c. 5.

7. The spiritual court can only enjoin penance, but cannot award damage.

THE proceedings of the spiritual judges are for the reformation of the inner-man, *Pro salute animæ*, by enjoining him penance; but the judges of the common law are to proceed to give damages for the wrong or injury done^b.

^b Coke 4. rep. 29.

8. How far capital crimes are examinable in ecclesiastical courts.

FELONY and capital crimes are not examinable in ecclesiastical courts, not even for purposes cognoscible there, (as deprivation of clergymen, &c.) and therefore they may not originally judge in such a crime, in order to prove a man criminous. But when he is so proved, by conviction, in the proper court, they may build a sentence of Deprivation upon such conviction; for thereby they do not impeach, but rather affirm the verdict in the temporal court^c.

^c Gibf. vol. 2. p. 1062, &c.

9. The oath of purgation; the procedure in relation to it. It is now abolished.

AN oath of Purgation was customary in England, *viz.* That when any person lay under a common suspicion, or public fame of incontinency, or other vice, deemed spiritual, he might be summoned before a spiritual judge, and charged with such crime; and, if he confessed it, a certain Penance was imposed upon him; but, if he denied it, the judge enjoined him Purgation by his own oath, and the oath of five or six persons of good fame, That they believed what he swore was true^d. If the person purged himself, as above, he was dismissed, and restored to his good name; but, if he refused to take the oath, he was holden for a person convict; and, if he did not appear at all, he was proceeded against as Contumacious. This vexatious method of procedure against persons upon common fame, which is as often false as true, was justly abolished by statute^e; which declares It not lawful for any ecclesiastical judge to tender or administer the oath, usually called the Oath *ex officio*, or any other oath, whereby a person may be compelled to confess a crime, or accuse himself; or to purge himself of any criminal matter, whereby he may be liable to corporal, or other punishment, any custom heretofore notwithstanding.

^d Gibf. p. 188.

^e 13 Cha. II. c. 12.

10. Advisable, that the oath of purgation were entirely abolished out of the ecclesiastical courts of Scotland.

IT were to be wished, that the oath of purgation, sometimes practised before our ecclesiastical courts in Scotland, almost in the very same manner, and to the like effect as, of old, in England, were entirely abolished; and indeed it is more tenderly used than formerly. Such canonical purgation, when the party complies, frequently occasions a suspicion of perjury to be raised against him, instead of clearing him from imputation of the crime, wherewith he was charged upon common fame; and, notwithstanding one does not submit to such measure, it would seem unreasonable to inflict any punishment upon him, for a crime of which there is no proof.

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It was likewise customary of old in England, to pay money for penance imposed by ecclesiastical courts, in way of censure or discipline. The laws of the church contained divers rules concerning Redemption or Commutation of penance; but the learned author of the new ecclesiastical Code owns, that none of these regulations are in force^a. However, he lays it down as a rule, That commutation of penance for money, or the redeeming it, may be allowed on extraordinary occasions, either where the party is of such temper as to be more concerned for the loss of his money than corporal penance, or is a man of quality or reputation. It were good, in my apprehension, that such custom were introduced with us, it might probably be a more effectual restraint upon lewdness and immoralities than the penance or church-censure commonly imposed.

^a Gibb. vol. II. p. 1092.

11. Commutation of penance for a sum of money accustomed sometimes; is this allowable or conducive to the end of ecclesiastical discipline.

THE consequences of ecclesiastical judgments against delinquents, tho' originally intended for the reformation of manners, were horrid and terrible, especially in the case of heresy, where a writ *De hæretico comburendo*, issued out of the king's courts, to commit an heretic, convicted before the spiritual court, to the flames; and which continued in force a good time after the reformation; and there are instances of persons burned for heresy in the reign of king James I.^b This writ, with its direful consequences, and all punishments by death, in pursuance of any ecclesiastical censures, are abolished by statute^c. But the jurisdiction of archbishops and bishops, and other judges of ecclesiastical courts, in cases of atheism, blasphemy, heresy, schism, and other damnable doctrines and opinions, to punish the same by excommunication, and other ecclesiastical censures, is reserved, as before the act.

^b Gibb. vol. I. p. 426.

^c 29 Cha. II. c. 9.

12. The consequences of judgments of ecclesiastical courts, against delinquents, terrible of old, especially in the case of heresy, whereupon followed the writ *De hæretico comburendo*: this now abolished.

EXCOMMUNICATION has still, in England, the effect of disabling one from suing, and likewise from bearing testimony; nor shall he have a Christian burial. By the writ *De excommunicato capiendo*, the party is to lie in prison when apprehended, pursuant to the several processes for that purpose, till he satisfies the sentence of the spiritual court, or finds surety to do it^d. A popish recusant is reputed, to all intents and purposes, as a person convicted and excommunicated in the ecclesiastical court^e.

^d Id. vol. II. p. 1096.
^e 3 Ja. I. c. 5, &c.

13. The consequences of excommunication. A popish recusant convicted, holden as excommunicated.

WHEREVER the spiritual court hath jurisdiction, and the party does not appear to their citation; or, after sentence, being admonished, refuses to obey it, he may be excommunicated. By several acts of parliament, offenders of certain kinds are made to incur excommunication, *Ipso facto*, as for laying violent hands on any person in the church or church-yard, &c.^f But there must be a precedent conviction at law; for it is implied in any penal law, That none shall incur the penalty till he be found guilty, and the excommunication must appear judicially; for otherwise there could be no absolution from it^g.

^f 6 Edw. VI. c. 4. 3 Ja. I. c. 5.

^g Bac. new abr. (excommunication) 315.

14. This censure is imposed for contempt, in not appearing upon a citation, or not obeying the sentence; the case where it is said, in a statute, to be incurred *ipso facto*.

BY the law of England, a layman, in any suit against him before ecclesiastical courts, whereby he is to forfeit a penalty, by statute or otherwise, is not bound to answer upon his oath, in matters con-

15. How far one bound to answer before ecclesiastical courts upon oath.

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cerning his faith ; because there is a statute by which he may be punished, if he publish false doctrine ^a.

^a Vin. (prohibition) p. 1.

T I T. XXIII.

Actions at Law in general, especially before the Court of Session.

1. An action at law, its various names ; it properly denotes a depending suit.

HAVING thus discoursed upon the jurisdiction of courts, I proceed to Actions at Law, which are the subject matter of courts of judicature, and wherein jurisdiction is exercised, by administering justice between man and man. If people were allowed to make reprisals at their own hand, when injuries are done them, it would introduce all the inconveniencies that the state of nature was subject to, and which civil government was intended to prevent. Hence therefore men are obliged to submit to the public their claims against one another, and to have recourse to the law, and courts of justice for decision of them, and this application is the Bringing of an action. For an action at law is "The prosecution of one's right before a court of justice, in order to judgment thereon." It is otherwise termed a Cause, Process, Pursuit, Suit, or Pley ; these being all words of the same importance, and denote a depending action for the most part.

2. It is likewise sometimes understood of the right itself, or ground of action ; in this general sense it is taken in the emperor's definition ; it does not properly comprehend criminal prosecutions.

It is however, sometimes taken for the Right itself, or ground of action : thus it is understood in the statutes concerning the prescription or limitation of actions, That they shall be prosecuted within a certain limited time, or otherwise the right is prescribed or cut off. Accordingly those statutes, in the case of prescription, mention not only actions already intended, but likewise "Actions competent to be intended ^a." An action therefore is either that which is actually brought, or the right to prosecute such action, *i. e.* the ground or cause of it. In this general sense the Emperor defines an action, *Jus persequendi in judicio quod nobis debetur* ^b, A right of prosecuting in judgment for what is due to us. The word *Debetur*, *one's due*, must be here understood in a large acceptation, so as to comprehend not only personal actions, but likewise those arising from real rights, as that of property and the like, whereby we pursue for the possession thereof, the restoring of which is due to us. It extends also to the claim of damages, or penalties due to the party aggrieved by wrong ^c ; but not to the prosecution of crimes at the suit of the public, as appears from the import of the definition, and the various divisions of actions, subjoined by the Emperor. In both senses actions fall under my design. I shall here consider, in general, Actions at law, and thereafter the several distinctions of them, and the particular actions relating to our different rights, and afterwards view them as actually intended ; and take notice of the material steps of judicial procedure in actions before the court of session.

^a P. 1669. c. 9.

^b Instit. princ. de action.

^c L. 25. ff. de oblig. et act. l. 178. ff. § fin. de verb. sign.

3. A judge, pursuer, and defender necessary in actions.

THREE persons regularly are necessary in an action or judicial proceeding, *viz.* the Pursuer and Defender that litigate the cause, and the Judge who pronounces judgment thereon. Advocates and proctors, are prolocutors for the parties, and represent them before the judges, and the clerks take down in writing the judicial proceedings.

ACTIONS

ACTIONS are either in the First or Second Instance. An action in the First Instance is "the first dependence of it while it remains before the same judge:" thus, actions before inferior courts, or actions originally intended or brought before the court of session, are in the first instance. But suspensions, or reductions of decrees, are actions in the Second Instance, which, in civil cases, can only be before the lords of session. Advocations are improperly said to be actions in the second instance; for if, at calling the advocacy, the cause is advocated, it comes to be in the same case as if it had been originally sued before the court to which it is advocated; and if it is Remitted, it goes on in the same state before the inferior court, which must observe the instructions given by the superior, if any there be. If No Process is found by the judge in respect of a dilatory defence, the instance perishes; but a new action may be intended for the same cause. Whereas, if a peremptory defence is sustained, and thereon decree-absolutive follows, the right itself, or ground of action, is cut off, unless that decree shall be reduced or simply suspended in the second instance. A Reduction is termed an action in the second instance, in an old statute^a, without specifying suspensions; but That does not exclude a suspension from being such: both stand in place of Appeals or Reviews of former sentences.

^a P. 1584.
c. 3.

4. Actions are either in the first or second instance; advocations not properly actions in the second instance; suspensions and reductions only such; an Instance, what.

ALL actions are either Summary or Ordinary. Summary actions are such as proceed on a citation by summary warrant from the court, without abiding the ordinary diets of compareance. Thus, before the court of session, summary complaints are allowed against members of the college of justice, in matters of abuse or misbehaviour in their office; against inferior judges or suitors before them, for contempt of the lords authority, by proceeding after their advocacy or suspension is intimated; and in all innovations or violations, *pendente lite*, or during the dependence of a suit, to have matters restored to the same state. Thus, likewise where one's right or possession is invaded *via facti*, or by a party without lawful warrant, and recently complained of, the lords summarily interpose their authority for putting things in the same condition, as the Roman Prætor did in the like cases by his Interdicts. Suspensions may be termed Summary Actions, as likewise Advocations; because they are brought in without the preliminaries of ordinary actions, and are summarily discussed, of both which I shall afterwards speak at large. Summary decrees of registration are not properly Actions, as there is no real judicial procedure, by citation of the parties in order thereto, and those fall to be considered in discoursing upon decrees hereafter.

5. They are either summary or ordinary actions; complaints, summary actions; suspensions and advocations may be deemed such.

ORDINARY Actions are "those which proceed upon citation of the defender in the ordinary course." The warrant of this citation before the court of session, is a Summons in the king's name, under his majesty's signet, subscribed by one of the clerks to the signet. By it messengers at arms, as Sheriffs in that part, *i. e.* in place of the ordinary sheriffs, are commanded To summon, warn and charge the defender to compare, or appear before the court, (by himself or his advocate) at certain diets therein mentioned, with continuation of days, to answer at the instance of the pursuer in the matter libelled in the summons.

6. Ordinary actions before the lords of session; their warrant a summons under the signet.

SUM-

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7. Summonses either privileged or not privileged.

SUMMONSES are either privileged, *viz.* upon fewer than the ordinary days of compearance, which are 21 for the first, and six for the second diet; and 60 and 15 days for first and second diets, as to those out of the kingdom, as I have set forth elsewhere^a. Those privileged ones require a bill to the court of session, praying warrant for raising the same, which passes of course before the lord ordinary on the bills: and because a great abuse was committed, by the writers to the signet presenting such bills for divers summonses that were not intitled to any privilege, the lords declared to what summonses such privilege belonged, and the extent of it. The indulgence of fewer days of compearance, in some cases, may have been given, either because of the necessity of a present remedy, or in respect the matter had been in the main formerly canvassed, or that, being a matter of easy discussion, it required no long time for answering. The privileged summonses are all on six days warning, (and they are specified in the act) except recent spuilie, ejections, intrusions, and succeeding in the vice, which are upon 15 days^b.

^a Sup. tit. 6. messengers.

^b Act of sed. July 21. 1672.

8. Summonses, and hornings against people in Orkney and Zetland, must be served on 40 days.

By special statute, All summonses against the inhabitants of Orkney and Zetland, before the court of session or justiciary, and letters of horning or lawborows upon their decrees, or by their warrant, must be executed upon 40 days, by reason of their great distance from the city of Edinburgh, the ordinary seat of those courts, without prejudice to diligence on writings registred, when the party consents that execution should pass on fewer days^c.

^c P. 1685. c. 43.

9. Certain actions privileged in respect of their not abiding the course of the rolls, or their being admitted by summary complaint.

SOME actions are privileged in respect of their not abiding the course of the rolls; but are summarily called before the next week's ordinary, as all adjudications after the first, In order to their being within year and day of it. Summonses of ranking and sale, That the estate may be speedily sold, and the price distributed among the creditors; wakenings and transferences, That the original suit may proceed without loss of time; and the king's causes, On account of his royal prerogative. All those, as likewise summary complaints, and incident applications to the lords, as sequestration of a bankrupt estate, the vindicating the authority of the lords, and punishing abuses committed in the session-house, or upon parties in suit, their lawiers and agents may be deemed actions Extraordinary, and are treated of by the lord Stair as such^d.

^d B. 4. tit. 36.

10. The certification implied in all summonses is, that, in case of the defender's absence, the lords will proceed as if he did compear; and where the matter is to be referred to his oath, that in such case he shall be

THE implied Certification, and which, according to the stile, ought to be express, is, That if the defender appear not, the lords will proceed in the cause, and decree him in the terms libelled. Upon such decree in absence, all execution will follow, as if it had been upon appearance, unless it is suspended, and thereby anew subjected to the review of the court; but, before he is reponed, he must refund the pursuer his expences, if the decree was regularly obtained. If the matter is to be referred to the defender's oath, the certification is, That, in case of his absence, he shall be Holden as confessed thereon; and if he die without being reponed to his oath, after decree is given holding him as confessed on the libel, the decree will be effectual, as if he had owned the same upon oath. But in this case the defender must be Personally apprehended, to which an Edictal citation of persons out

out of the kingdom is equivalent. Other summonses have their particular certifications, the most important of which is in summonses of reduction and improbation, That, in case the writings called for are not produced, they shall be holden as false and forged; against which, tho' in abſence, it is difficult to be reponed, unleſs it is recently challenged, and the writings produced.

held as con-
feſt.

As all ſummonſes muſt be executed, or ſerved againſt the party; and even tho' the defender be minor, or an infant, he muſt ſtill be cited; but becauſe he has not *Perſonam ſtandi in judicio*, or cannot ſtand in judgment by himſelf, therefore his tutors and curators muſt be cited in general, at the market-croſs of the head-burgh of the ſhire where the minor reſides; and, tho' he have no tutors or curators, yet ſuch citation is good. And, if appearance is made for the minor, the judge, at the deſire of any of his friends, or of the other party, will name ſome as tutors or curators *ad litem*, to authoriſe him in ſuch ſuit, who makes oath to be faithful in that proceſs without other ſolemnity. I have ſpoken at large of executions, in diſcourſing upon meſſengers, whoſe province it is to ſerve them^a, and ſhall add no further on that head.

11. The man-
ner of exe-
cuting ſum-
monſes a-
gainſt mi-
nors.

We have no ſummary execution, in order to an action at law, by arreſting or apprehending the perſon of the defender on a Writ, and obliging him to find bail to anſwer the ſuit: but, if he is a Foreigner, accidentally here, or is ſuſpected of flight, warrant will be granted by the judge to arreſt ſuch perſon, till he find caution to anſwer to the obtainer's claim before the competent courts, as I have fully ſhewn elſewhere^b. Nor can any private perſon ſeize his debtor without a warrant, or authority from a judge competent; only common reaſon makes it lawful, for one who finds his debtor in flight with his effects, to ſeize and detain him till he obtain ſuch warrant. This was allowed by the civil law^c, and the nature of the thing, to prevent fraud, muſt juſtify ſuch meaſure everywhere. Officers before inferior courts are underſtood to have an implied warrant, by their office, to ſummon perſons to the court, which they were in uſe to do without any ſpecial warrant; but their executions behoved to be in writing^d. And now, by the late regulations made by the ſheriff-deputes, there muſt be a precept ſigned by the clerk of the court, in virtue whereof the citation muſt be given before their courts.

12. In what
caſes is ſum-
mary ſeizing
the perſon of
the debtor,
with or with-
out a war-
rant from the
judge, law-
ful. May of-
ficers before
inferior
courts cite
perſons with-
out a writ-
ten warrant.

A SUMMONS cannot be executed after year and day of its date; and when it is executed, it muſt be called within year and day of the laſt diet of compearance, otherwiſe it falls: but, if it is once duly called by the clerk, it regularly may thereafter be wakened, and inſiſted in, any time, within 40 years^e. But there is an exception of actions of tutory and curatory-accounts, which require ſome judicial ſtep to be made, whereby they are Inſiſted in, otherwiſe they preſcribe in 10 years after the action was competent, the ſimple calling the ſummons not being ſufficient to bar the preſcription, in reſpect of the expreſs terms of the ſtatute^f; and certain other actions muſt be wakened every five years, as I obſerved in another place^g.

13. A ſum-
mons muſt
be executed
within year
and day of
its date;
when exe-
cuted, it muſt
be called ju-
dicially with-
in year and
day of the
laſt diet of
compear-
ance; once
called, laſts
regularly for
40 years.

^a Act of ſed.
Feb. 26.
1718.

^f P. 1696.
c. 9.
^g B. 2. tit. 12.
ſect. 4.

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14. The effects of an executed summons, or of one judicially called.

THE action is intended by executing the summons, which has divers signal effects. It interrupts prescription; it likewise renders the thing in question litigious, so that purchasers thereafter are in the same state with their authors, whose oath is good against them who acquired, after the matter is litigious. And the summons being regularly called, it becomes a Pley, or depending suit; and therefore no member of the college of justice, or of inferior courts, can purchase it, upon pain of deprivation^a; and if one of the parties, after the summons is executed, invade the other, he loses the cause, being battery *pendente lite*^b.

^aP. 1594.
c. 220.

^bIbid. c. 223.

15. In a suit at the instance of one out of the kingdom, there must be a factory for him; to what is such factor liable.

IF an action is intended at the suit of a person out of the kingdom, there must be either a factory granted to pursue, or caution found for the defender's expences, in case he prevail, and costs of suit be awarded against the pursuer, to which the factor he appoints is liable; for, if it were otherwise, people might be harrassed by groundless suits, at the instance of foreigners, and have no security for their indemnification^c. Such factor is likewise bound, for the same reason, to find caution to answer the defender's claim in a Re-convention, or counter-action^d.

^cSpotsw (attorney) Febr. 14. 1627. Pyramnes. June 1728. Pringle.
^dJuly 25. 1739. Horn. Novem. 8. 1678. Vans.

16. All persons may be pursued; in actions against the king, the officers of state only called.

ALL persons may be pursued; nor do we observe the precaution of the civil law, That liberty behoved to be obtained from the Pretor; for convening parents, and others to whom respect is due, in certain actions, implying fraud or infamy. All persons, even those in authority, may be pursued, with us, without exception of the king; but then the officers of state are only called, they being bound to answer for his majesty.

17. The privilege of members of parliament as to suits against them.

THE members of parliament, during its sitting, cannot be pursued, in respect of the privilege of parliament; that they may not be diverted from attending the service of the public, and which will take place, even tho' the privilege is not pleaded; but they may wave it. And the house, of which they are members, may license such suits, if they see cause, as I formerly observed^e.

^eSup. tit. I.

18. All persons may be pursuers, except persons attainted, and aliens-enemy, persons lying at the horn, and papists, in real actions upon gratuitous rights.

IN the same manner all persons may pursue, for the law ought to be open to all people, to make their claims effectual; since For every right there must be a remedy, and want of right and want of remedy are the same thing; and therefore none are excluded from bringing their actions, except persons attainted, or aliens-enemy, *i. e.* the subjects of a state at war with us. Persons excommunicated by the church could not formerly pursue or defend; but such procedure, on excommunication, is now abolished^f. Those who are lying at the horn, cannot appear in any action till they are relaxed, which is easily obtained to capacitate them. Profest papists cannot insist in an adjudication, or other real action, upon gratuitous deeds^g.

^fP. 1690.
c. 28.

^gP. 1700.
c. 3.

19. Where the king is pursuer, his advocate alone is insert as such.

ALL summonses (as other writs) are in the king's name, to authorise the same, and citation to follow thereon, the supreme executive power being lodged in him. But where his majesty is to sue any action, as in Indictments for crimes, his advocate is the prosecutor for the interest of the king.

THE

TIT. XXIII. Actions at Law in general, &c. 603

* Jan. 26.
1636. lady
Borthwick.

THE pursuer's Title ought regularly to be complete before he raises his summons; but, if the pursuer has a right to the principal subject, he may make up his title to collateral interests, *cum processu*; as where a pursuer, who is both heir and executor, has made up a title as heir in the annualrent-right, he may do it as to the bygone annualrents, by confirming the same after the suit commenced. The subject pursued for ought likewise to be due before the summons is raised; but, if the pursuer has right to a conditional obligation, or such, whereof the day of payment is not come, it may be purified during the suit, and till then the procedure must sist, except in some extraordinary cases, where there is danger by delay. Thus, one may adjudge for security of a debt before the term of payment; because the estate may be in hazard of being carried off by the adjudgers. And, tho' that were not the case, yet it is reasonable the creditor be allowed to secure his debt in all events.

20. Regularly the pursuer's title ought to be complete, and the subject pursued for due, before raising the summons; this sometimes otherwise.

In some cases parties are admitted for their Interest, without any citation at all at their own instance; for, if the subject is already brought into judgment, by suit, in due course, any other that has interest therein, as well as the pursuer, may appear and produce it, and compete thereon, as if he had been an original party. Thus, in actions of mails and duties, or for rents of lands, at the suit of any person interested therein, all others who claim right to the subject may compare for their interest: and, in a forthcoming, all arresters, or others pretending claims to the thing in dispute, will be heard in the same manner as the pursuer. This expedient is for shortening pleas, and for preventing damage which third parties might otherwise suffer.

21. In suits at one's instance, others having interest in the subject admitted, as if they were pursuers; this allowed for shortening processes.

In most actions the Libel or Declaration sets forth the pursuer's claim, premising the law, (called by some the Proposition) and subjoining the fact (termed the Subsumption) and the Conclusion is for a decree against the defender for the claim libelled. All which is before the Will, *i. e.* the king's command to messengers to cite the defender to answer to the libel, with certification, That otherwise he will be decreed in manner libelled; and the days of compareance are here set down, or a blank space left for them. But other summonses, as Reductions, begin with the will and days of compareance, and proceed to the conclusion, *viz.* That the writings called for should be reduced, &c. and then the reasons of reduction are subjoined. It is not easy to find the reason of the difference in the order of the stile aforesaid. Sir George Mackenzie, in his Tract upon actions, endeavours to give it, and likewise makes divers observations on the several parts of the tenor of our summonses, and derives them from some parallels in the civil law. But, as an enquiry of that kind is rather curious than useful in practice, I omit it: and the reader, if he pleases, may satisfy his curiosity from the treatise itself in print.

22. The stile of libels, cursorily mentioned; not easy to find the reason of difference between the stile of ordinary summonses, and that of reductions.

THE summons is a warrant under the king's signet, and in his name, subscribed by a writer to the signet, to cite the defender to compare; and, in common summonses, there is nothing libelled at all, as they come from the signet; all that is to be found there, is the king's authority for citing the party, the pursuer's name, and some scattered

23. In common summonses nothing is libelled, as they come from the signet,

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and were in use to be so executed, but now must be libelled before execution. A blank summons can have no effect, till 'tis libelled and given out to see.

scattered words of stile. Most summonses were, till of late, commonly executed blank, as they came from the signet; and thereafter, before calling them by the clerk, were libelled. But what is above observed, touching the effects of an executed summons, must be understood of such as are libelled before executing, and whereof a full copy is given to the defender, prefixed to the messenger's citation, which must set forth, That it was so done. For otherwise the executing a blank summons could have no effect, till it was libelled, and given out to the defender's lawier to see, whereby alone the party could be certiorated of what is contained therein.

24. All summonses, of old, behoved to be libelled before executing them, as is the case at present.

I APPREHEND, that the executing summonses blank, at any time, was irregular, and that the custom crept in by abuse, and the negligence of the conductors of law-suits; for it appears from old precedents, that even executing the first summons operated an interruption of prescription, as I have remarked in another place ^a, which could not be, unless the same had been libelled. And as to summonses that required an act of continuation, (which most of them did) bearing warrant for citation to the second diet of appearance, it is plain, that the first summons behoved to be libelled before such act could issue ^b. And therefore, all summonses thereafter, that contained warrant for citing the party to first and second diets of compearance, behoved in course to have been libelled, as the summons on the act of continuation formerly was.

^aB.2. tit. last, § 55. 56.

^bP. 1672. c. 6.

25. Executions, called Indorsations, as being in use to be wrote on the back of the summonses.

AT the end of the will in the summons, there was, by the old stile, an injunction to the messenger to return the same to the pursuer Duly executed and indorsed. Hence, executions were justly called Indorsations, and they, with their warrant, make a depending action. By the present custom, they are either wrote on the back of the summons, or on a writing apart, at the pleasure of the messenger or party.

26. Actions, how brought into court.

ALL summonses, in ordinary actions, after the days of compearance are elapsed, may be called by one of the clerks in the outer-house in session-time, in order to bring the cause into judgment, and at this calling of the summons the advocate for the pursuer is marked; and, if any compearance is made for the defender, the advocate for him is likewise taken notice of, and the process is given out to him to see, and he must return the same, with his defences, and then it is proceeded in, as the forms direct ^c.

^cAct of sed. July 1. 1729, &c.

27. Tabulating summonses, is it of any effect at present.

SUMMONSES, on two diets of compearance, are marked by the collector of the clerk's dues, as Tabulated, before they are called by the clerk, in manner above. This is a vestige of the old rule, at the institution of the college of justice, by which such summonses were to be insert in a table, and called in course, as there set down, with several qualifications and exceptions mentioned in the statute ^d. But now, after the introduction of the books of enrollment, by the regulations 1672, it seems to be an insignificant ceremony, kept up only for the sake of the dues; but, because it is an ordinary formality, if the objection is made when the action comes to be insisted in, it behoved to be adhibited. But, if the want of tabulating is overlooked,

^dP. 1537. c. 44, &c.

TIT. XXIII. Observat. on the Law of England, &c. 605

looked, it can be no defect in the decree. I shall have occasion to discourse on the farther proceeding in ordinary actions hereafter, after discussing the distinctions of them.

^a L. 43. § 1.
ff. de reg. jur.

^b Spotsw. (de
action.) p. 4.
in fin.
^c Cap. 6. ext.
de caus. pos-
sess. et pro-
priet.

^d L. 1. § 4.
ff. quod legat.

IT is a maxim in the civil law, That divers actions touching the same thing, or arising from the same fact, cannot be accumulated in the same libel or declaration, *Quotiens concurrunt plures actiones ejusdem rei nomine, una quis experire debet*^a. However, one cannot sue two actions in one summons, that are not consistent, as a proving the tenor of the deed, and an exhibition of the same deed; because the supposition of its existence is repugnant to its being lost, and therefore the pursuer, in such case, must make his election of the one, and pass from the other^b; but one may sue a petitory and possessory action together, which, tho' prohibited by the civil law, was allowed by the canon^c. The rule above referred to is general; but it admitted, even in the civil law, of this exception, viz. That if it was uncertain which action was most competent, both might be laid alternately, under protestation, that the pursuer was only to insist for what was truly due^d: wherefore there is not so great difference between the modern usage in that respect, and the prescription of the civil law, as is generally imagined.

28. How far
cumulation
of actions
allowed.

^e L. 130. ff.
de reg. juris.

^f L. 1. § 26,
27. ff. vi
bon. rap.

^g B. 1. tit. 10.
§ 3.

THERE was another rule with the Romans, That where more actions, especially Penal ones, concurred, in relation to the same thing, the prosecuting the one did not exclude the other, *Nunquam actiones, præsertim pœnales, de eadem re concurrentes, alia aliam consumit*^e; so that after the party had sued one of the actions, and therein recovered what was competent thereby, he might still insist in the other for the residue. For example, The *Actio vi bonorum raptorum*, was for threefold, including the thing taken away, or its value; now if the party had insisted in the *condictio furtiva*, and recovered the thing or its value, he might still proceed in the other action for twofold the value^f. We have little or no use for this rule; for tho', by the civil law, divers penal actions, upon delinquencies, were competent to the party aggrieved, yet, by our law, he regularly has only his damages, as I have shown elsewhere^g.

29. Where
more actions
are compe-
tent touch-
ing the same
thing, does
the one bar
the other.

Observations on the Law of England, in relation to the Premises.

AS the warrants of all actions at law, and of executions upon decrees, are called with us Letters; so in England they are named Writs, and both are in the stile of letters or epistles from the king, sealed with his signet or seal, directed to some judge or officer of the law, commanding or authorising something to be done to the complainant, by the party against whom they are directed.

1. The war-
rants of all
actions at
law, and of
execution
upon decrees,
are writs or
letters in the
king's name.

SOME of these writs are Original, *Brevia Originalia*, and such original writs are the warrants of suits before the respective courts in Westminster; as our summonses are before our superior courts here. Other writs are Judicial, founded on judgments and judicial processes; similar to which all our letters of horning, caption, and other letters proceeding upon decrees in order to execution are.

2. Writs are
either origi-
nal, which
are the war-
rants of ac-
tions, or judi-
cial, founded
on judgment.

3. Breves or writs are the foundation upon which the whole law depends; the register containing them is of great authority.

BREVES or Writs are the foundations on which the whole law depends, as a great author, who wrote a learned treatise upon them, justly observed^a. The antient book called the Register, containing those writs, is of great authority in the law of England^b. In like manner the foundations of our law may be discovered very much from the stiles of summonses, and other letters and writs in the king's name, founding actions, or warranting execution of decrees therein.

^a Fitz. præf. de nat. brev.
^b Vin. (actions) 547.

T I T. XXIV.

The several Distinctions of Actions.

THUS, I have described the general nature of Actions at law, before the court of session; but, in order to apprehend the import of particular actions, their several Distinctions must be adverted to, which therefore I shall consider in this title; and likewise briefly take notice of some of the most important, which have not been already discoursed upon; or may not be sufficiently understood, from the respective grounds of actions explained throughout this work. Actions by the civil law were variously divided, and most of those distinctions are of use in our practice; and there are likewise some distinctions of them peculiar to our own law.

SECTION I. *Actions either Perpetual or Temporary, Civil or Criminal, Real or Personal.*

1. Actions either perpetual, lasting for 40 years, or temporary, cut off by shorter prescriptions; temporary actions regularly become perpetual, after suit commenced; exceptions from the rule.

In the first place therefore, Actions are either Perpetual, that last with us 40 years, tho', by the civil law, most of them were cut off by 30 years silence^a; or Temporary, that prescribe in a shorter time^b. This concerns not only actions to be Intended, or the rights themselves, but likewise these already raised, which shall prescribe, unless insisted in thereafter within the time limited. All actions, unless insisted in thereafter within the time limited. All actions, once intended, continue regularly 40 years after the last step of the procedure; except the statute, introducing the prescription, provides otherwise: thus, actions for house-mails, merchants accounts, and other the like debts, tho' before intending they prescribe in three years, yet, after they are once brought into judgment, they continue for 40 years. The reason why moving an action prolongs the claim is, because *Judicio quasi contrahitur*. There is a kind of innovation of the debt, by its being brought into judgment, and the prescription is founded on a presumption of payment, by the party's delay to enter his claim, which is taken off by the pursuit. I have discoursed fully of prescriptions of all kinds in the proper place^c.

^a Tit. cod. de præsc. 30 aut 40 Annæ.
^b Tit. instit. de perpet. et temp. actionibus.

^c B. 2. tit. last.

2. Actions are civil or criminal; civil, either real or personal. In the most extensive sense, an action personal is what arises from a personal

In the next place, actions are divided into Civil and Criminal. Criminal, such as concern the punishment of crimes, and are more properly called Indictments, and can only be at the suit of the public; or, if the private party is prosecutor, it must be with concurrence of the Procurator-fiscal, for the interest of the public, before criminal courts. Wherefore these fall not within my design. Civil Actions are such as relate to civil rights, before civil courts of justice, in order to recover what is our own, or due to us, as damages or otherwise, and are either Real, *In rem*, or personal, *In personam*. In the civil law, all actions

TIT. XXIV. Actions *Bonæ Fidei, Stricti Juris, &c.* 607

^a Instit. tit. de action. § 1.

^b Instit. de action. § 1, &c.

actions that arise from a *Jus in re*, or a real right, were termed Actions *in rem*, as *Rei vindicatio, &c.* and those which arise from an obligation are termed *Actiones in personam*, Personal Actions^a. Thus, an action for the delivery of moveables, is either a Personal Action, or a Real, as it is founded on the defender's obligation, or on the pursuer's right of property; but the defender is decreed to deliver the thing, tho' the pursuer's claim be founded in his right of property in the same. All actions that are directed against the Thing, and have no personal conclusion upon the defender, may justly be esteemed Real; as adjudications, and poidings of the ground: and all actions wherein the defender is to be decreed to pay, perform, or deliver any thing, are personal; because thereby the Person of the defender is affected in the first place, and his Estate only consequentialy. The Emperor Justinian begins with this division, and enlarges much upon it, and subjoins various examples of both kinds^b, most of which have their parallels with us; since, in a comprehensive sense, adapted to the method of this treatise, all actions arising from personal rights are personal, and such as are founded on real rights, actions real. They may be sufficiently understood from what has been discoursed at large in the preceeding books of Rights personal and real; for undoubtedly the action must follow the nature of the right whereon it is founded, and therefore I shall proceed to the other distinctions of actions.

right; and a real action, such as is founded on a right real.

SECTION II. Actions either *Bonæ Fidei, Stricti Juris, or Arbitrariæ.*

^c D. tit. § 28.

^d Instit. tit. de action. § 28.

^e Instit. de action. § 31.

^f Ibid.

ANOTHER famous division of actions in the civil law is that whereby they are either actions *Bonæ Fidei, Stricti Juris, or Arbitrariæ*^c. Actions *Bonæ Fidei* are founded on contracts of the same characteristic. In those the judge is not confined to the express terms of the convention of parties, but may interpret the same, and add thereto, from equity, and their presumed meaning; we have a full catalogue of them set down by the Emperor Justinian^d. They are contracts whence an obligation arises on the part of both the contracters, *Utroque Citroque*, as sale, location, partnership, &c. Actions *Stricti Juris*, are those that arise from contracts of the same denomination, and in which an obligation lies only upon one of the contracters; as that for the Loan of money, in which the debtor is only bound; and Stipulation, *i. e.* "A promise conceived in a certain form of words, "by way of question and answer." In those the judge is restricted to the precise terms of the compact; not but that they likewise must be interpreted from equity, but in respect he cannot superadd any collateral Consideration, as interest or the like. Arbitrary Actions are those wherein the judge pronounces an interlocutory order; and if it is not complied with, he subjects the party to a penal sum, which in some was pretty high, as in the *Actio Quod metus causa*, he ordained the thing extorted to be restored, and, in default, awarded, against the party in contempt, quadruple the value^e. But, in most cases, the penalty of not obtemperating the interlocutory order of the court, was at their arbitrement^f.

3. The famous division of actions into these, *bonæ fidei, stricti juris, and arbitrariæ*, in the civil law explained.

THIS

4. The diversity of actions *bonæ fidei*, from those *stricti juris* among the Romans, proceeded from their method of administering justice.

THIS distinction of actions was of universal use among the old Romans, running thro' the whole chain of them: this proceeded from the state of their Tribunals. The Prætor, with them, in those days, cognosced the justice of the claim, on supposition that the facts were true, and gave his ordinance according to the nature of the contract in question between the parties; and, if he sustained the action, he remitted the Ministerial part to one of the *Judices Pedanei*, i. e. judges of a lower order, always ready for that purpose, to take the evidence, and pronounce sentence conform thereto^a, prescribing to them at the same time a *Formula*, adapted to the genius of the action; so that if it was upon a contract *bonæ fidei*, liberty was given to the judge to determine *Ex bono et æquo*, but which was omitted in the *formula* upon those *stricti juris*^b. And after judgment was given, the Prætor caused execute it by his own authority.

^a L. 4. c. de pedan. judic.

^b Cicero, lib. 2. de invent.

5. This distinction of actions came, by degrees, after abolition of the old formulas of actions, to be of less consequence among the Romans, and is of little use with us.

IN process of time, this diversity of actions came to be of no great significancy, even among the Romans: for in the first place, the Emperor Constantine the Great abolished entirely these *formulas* of actions, as ensnaring to parties by the nicety of words, or even syllables, and thereby proving an obstacle to the course of justice, *Aucupatione syllabarum insidiantes*, as the Emperor speaks^c. And thereafter that method of appointing ministerial judges was laid aside, and the Prætors were enjoined to undergo the whole judicature themselves^d. I have already observed, in discoursing upon contracts, that the distinction of them into those *bonæ fidei* and *stricti juris*, in the sense of the civil law, is of little use with us^e. And by the same rule, a diversity in the form, and nature of actions upon them, cannot obtain; nor have we almost any vestige or appearance of it in our practice; and I have made the above observations, chiefly that I might not be thought indolent in overlooking a division of actions, so much celebrated in the civil law.

^c L. 1. cod. de formalis, fol.

^d L. 2. c. de pedan. judic.

^e B. 1. tit. 11. § 65.

6. Somewhat similar to arbitrary actions in use with us.

AT the same time I must take notice, That, in our practice, there is something similar to arbitrary actions: for, in many instances, the arbitrement of the judges is requisite to be interposed; as where the issue of the point depends upon the Rationality of a deed in question: thus, the provisions to a wife and children of a marriage, in a postnuptial contract, are to be modified at the arbitrement of the court of session, before whom the case is brought, in a question with prior creditors, where a Bankruptcy of the party who makes them occurs. The arbitrement of the court is likewise necessary, in questions touching the Diligence incumbent upon parties, in executing the contracts or obligations they come under. In all these, and the like cases, the only rule is that which is prescribed in the case of arbitrary actions: *In his actionibus permittitur judici ex bono et æquo*, (says the Emperor) *secundum cujusque rei de qua actum est naturam aestimare*^f, viz. That the judge consider the circumstances of every particular case, and determine the same according to equity.

^f § 31. instit. de action.

SECTION III. *Actions either Recuperatory or Penal.*

7. Actions are either for the thing

AGAIN, Actions are either Recuperatory, for obtaining what is truly ours, or owing to us, or real damage and interest due to us, called,

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^a § 16. 17.
inst. de acti-
onibus.

^b July 5.
1711. Lew-
ars.

^c L. 38. l. 111.
§ 1. ff. de reg.
juris.

^d L. 7. § 2. ff.
de condict.
furt.

^e Voet. de do.
ma. § 12.

^f L. 139. pr.
ff. de reg.
juris.

^g Jan. 22.
1751. Scot
contra Mac-
Lauchlan.

called *Rei persecutoria* in the civil law; or they are Penal, where something more is allowed, termed *Pœnales* in that law^a, which frequently very much exceed the true values and real profits. The rule with us is, That unless litiscontestation was made with the offender in those penal actions, the heir can only be liable for the true interest of the pursuer, but not in what is penal, as violent profits, or the like^b; because the deceased might have had defences sufficient to relieve him of the penal part, which, 'tis presumed, may not be known to the heir. And That is the true reason, that after litiscontestation, in which all the defences are presumed to have been proposed, the heir is simply liable to the penalty, if he succumb in them.

due, or pe-
nal actions,
where more
than the real
value is ad-
judged, as in
spuilies, &c.
These last,
so far as pe-
nal, only
good against
the heir, if
litiscontes-
tated with the
deceased.

It is very true, the general rule laid down in the civil law is, That no penal actions can lie against the heir, except so far as the heir profited *In quantum ad eum ex ea re pervenit*, where litiscontestation was not made with the offender^c. Only in the case of Theft, tho' the penal action of theft was not competent against the heir, unless it was litiscontested with the offender himself, yet action for the thing stolen, or its value, (called *Condictio furtiva*) was good against the heir; whether the thing came to his possession, or whether an action was brought against the deceased or not^d. But the subtilty of the Roman law, in making a distinction between the case of theft, and other offences, whence damage arises to the party aggrieved, is justly laid aside by the modern laws of most nations^e; and particularly with us. And indeed, by the same reason, that action is granted upon a contract for damages against the heir, where the party cannot, or will not make good his obligation, it ought to lie for damages on a delinquency; for it is alike to the sufferer, whether the damages occur thro' the contract or crime of the ancestor, and whether the party, or his heir, has thereby profited or not. Indeed, by litiscontestation with the offender, the party lesed gains the full penalty, in a question with the heir, even by the civil law^f; but there is no reason, that on the offender's death, before he could perhaps be conveyed, the party should not only lose the penalty due to him, but likewise his real damages. And accordingly the court of session sustained action against the heir, to the extent of the sum forcibly carried off by the deceased, and expences of suit; tho' the deceased was only one of many accomplices, and immediately delivered over the money, violently taken, to another, for whose behoof they were acting^g; for all concerned in a delinquency are liable, jointly and severally, to indemnify the person aggrieved; nor is it material, whether the offender kept the spoil to himself, threw it away, or gave the same to another.

8. The case
in the civil
law as to pe-
nal actions.
The decision
of it receded
from with
us, and else-
where.

9. Distinction
made be-
tween actions
merely penal
and mixed.

WE may take notice, on this head, of the distinction in the civil law between actions merely penal, as that of theft was with the Romans, where the whole penalty belonged to the private party, besides the *Condictio furtiva*, or action for recovery of the thing stolen; and those which included the party's indemnification likewise, as the *Actio vi bonorum raptorum*, which was for threefold, including the thing taken away; and the action *Ex lege Aquilia*, which was for the value of the thing destroyed, as at the time of the trespass committed, and farther, for as much more as it was worth the year be-

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fore^a, on which account it was deemed penal, and did not pass against the heirs of the offender^b. In the first kind, we follow the rule in the civil law, That they do not lie against heirs, unless they were sued against the deceased, and litiscontestation made thereon; but, in the second, we have varied from the general prescription of that law, and extended its dictate, in the special case of theft, to damage accruing by any crime. Thus, we have received the canon law, in that respect, by which action was given against the heir of the offender, for the real damage in all crimes^c. Thus, in the case of Spuilies, action is good against the heir of the spoliator for the thing, or its value, and in ejections for the true rent, without violent profits, or other peculiarities of those actions; which are only competent, if litiscontestation was made with the offender himself.

^a D. § 17. instit. de action.
^b Sect. 9. instit. de l. Aquil.

^c Cap. 5. ext. de rapt.

SECTION IV. *Actions either Private or Popular.*

10. Actions are either peculiar to the party interested; or popular, competent to any person that shall sue.

A DIVISION of actions, not to be omitted, is into those, whereby the party interested only can sue; and those in which any person whatever, capable of suing, may prosecute the party, which last are called Popular Actions. Divers of these popular actions took place with the Romans^d; and some likewise obtain with us, as the prosecution of Invaders of ministers, and that against Usurers, where the parties interested do not sue, and that against Destroyers of the game, &c.^e The rule, in this case, by the civil law, which, I conceive, likewise obtains with us, is, That after litiscontestation, the pursuer is understood creditor in the action, and it passes to his heirs, but not before^f. If an act of parliament gives a penalty, and creates a Forfeiture, to be recovered by action or information, at the suit of him who shall prosecute the same, as well in the king's name, as in his own, *Tam pro domino rege quam pro seipso*, it is a popular action; and, in such case, the fine is generally divided in the statute, by certain proportions between the king and the prosecutor.

^d Tit. ff. de pop. act.

^e P. 1585. c. 27.
P. 1594. c. 222.
P. 1707. c. 13.
24 Geo. II. c. 22.
^f L. 7. § 1. ff. de pop. actionibus. l. 12. ff. de verb. sign.

11. What if the penalty is in favour of the party interested.

FARTHER, if a statute prohibits, or commands a thing, the doing, or omission whereof, is both an immediate damage to a private person, and also highly concerns the good of the public, the party aggrieved may (and some say ought) bring his action, *Tam pro domino rege quam pro seipso*; especially, if the king be intitled to a fine^g.

^g Bac. (actions) p. 41.

12. How far an informer in a popular action intitled to costs; where the party has damages, he gets his costs.

AN informer in a popular action shall in no case whatever have his costs, unless they be expressly given him by the statute. But in cases where the party is allowed his damages, he has his costs likewise; for otherwise it would be in vain for him to sue, since it may happen that the costs would exceed the damages. And, for this reason, wherever a statute gives a certain penalty to the party aggrieved, he is intitled to his costs^h. But a mere informer can claim no more than the statute expressly gives him.

^h Ibid. p. 42.

13. What if the informer agree or compound with the defendant, or delays insisting in

By the statute of queen Elizabethⁱ, If any informer or plaintiff, in a popular action, shall compound or agree with any person that shall offend, or shall be supposed to offend against any penal statute, for any such offence, before answer made to the suit, or even after answer, but without consent of the court in which such suits shall be

ⁱ 13 Eliz. c. 1. made perper. 27 Eliz. c. 10.

TIT. XXIV. Actions either in the 1 or 2 Instance, &c. 611

be depending, he is liable to be set on the pillory, and to fine and imprisonment, and forfeits 10 l. and is disabled to sue any popular action upon any penal statute thereafter. And farther, by the same statute, If any informer or plaintiff, in such action, shall willingly delay his suit, or be nonsuited, or shall have the matter passed against him by verdict or judgment of law, he shall pay to the defendant his costs, charges and damages, to be assessed by the court.

the suit, or is nonsuited.

THE statute aforesaid expressly extends to all penalties and forfeitures that shall be imposed by any statute, in time coming; and provides, That if there is no time therein limited, within which the action shall be brought for the same, it shall expire within one year, so far as concerns the private party or prosecutor; and within two years after the cause of action, as to the interest of the crown, so that thereafter no action shall lie for such penalties, or forfeitures.

14. What if the statute does not mention the time, after which the action for the penalty shall expire; how is the action limited.

THIS statute of queen Elisabeth, as it relates to all future penalties or forfeitures, to which no limitation of time, as to suing for the same, is assigned in the acts imposing them, so it must regulate all actions competent to be brought before the court of session, or other courts in Scotland, for such penalties or forfeitures. And therefore, I have been the fuller in setting forth the said statute, and the nature of popular actions for penalties and forfeitures, introduced by British statutes, extending to Scotland, since the case must be determined by the same rules as in England. I had occasion to treat a little upon popular actions in another place *.

15. The same limitation takes place with us, as to actions competent upon such statutes.

*B. 2. tit. last, observ. § 22.

SECTION V. *Actions in the first or second Instance; Ordinary or Extraordinary.*

IN the foregoing title, I touched upon the distinction of actions into those in the First Instance, and those in the Second, which must be here farther considered. Actions are called, in the First Instance, as I apprehend, because the matter in them is then first laid before the court, at the instance of the pursuer. And therefore, in this general sense, they comprehend not only actions in the common form, proceeding upon citation of the party, but likewise Complaints to the court, and Suspensions of summary decrees of registration, for all these are brought before the court for the first time; but commonly they are understood only of Original actions, but not of suspensions of any kind. Those in the second instance, are such as have been before a court formerly, and received their determination, and are brought into judgment again, in order to a review of the proceedings. This is the case of Suspensions of decrees, given upon citation of the parties, and Reductions of such decrees; for in that manner the case is anew subjected to the cognizance of the court. Such actions are only competent before the court of session, or other superior court.

16. Actions in the first or second instance.

ONE is said to be absolved from the Instance, when there is some defect or informality in the proceeding, which may be amended in a fresh suit, viz. where a dilatory defence, setting aside the summons, is sustained; which is not an absolvitor from the action, i. e. the ground of action, but only a deliverance from that summons; and

17. An absolvitor from the instance.

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and therefore no decree is given, but only *No process* found ; and the instance is said to Perish, *i. e.* the summons is cast.

18. Some allegations not competent in the second instance, which were proponable in the first.

ALLEGATIONS or defences are sometimes competent against actions, in the first instance, which are not good in the second. Thus, after decrees *in foro*, what was Competent and Omitted, or Proponed and Repelled in the first instance, is not generally receivable in the second, by way of suspension or reduction. And Compensation, which might have been proponed before the decree, will not be admitted after decree has ensued. All which is introduced for the dispatch of justice, and to abridge unnecessary litigations.

19. Actions, ordinary or extraordinary.

A GENERAL division of actions, most frequent with us, is, that they are either Ordinary or Extraordinary. The first are these which proceed in the common course, by citation of the parties, whether on a privileged or other summons. Extraordinary, are such as are brought into court in a different manner, and not in the ordinary course of proceeding, *viz.* by way of Complaint or Suspension. As to complaints, the order in them may be understood, from what has been said of the same in the preceeding title, and in discoursing upon the court of session; and as to suspensions, they shall be considered hereafter*.

*Tit. suspensions.

20. Ordinary actions divided into declaratory, petitory, possessory, and accessory actions; the most remarkable of such, the subject of the four following sections, with an exception of some to be treated on elsewhere.

ORDINARY actions are either declaratory, petitory, possessory, or accessory. Declaratory are those, Whereby something is craved to be declared by the court, in behalf of the pursuer, either in relation to property, servitude, obligation, or other right. A Petitory action is, Where the defender is sought to be decreed in payment, performance or delivery, or any thing is craved to be adjudged from him to the pursuer: this extends to all actions upon personal contracts and obligations. Possessory, are those Which concern possession, as interdicts, spuilies, ejections, &c. These require nothing but recent possession in the pursuer, illegally molested or taken from him. Accessory, are those That depend on, and accede to other actions or rights, as transferences, &c. I shall, in the following sections, take notice of the most remarkable actions, according to this division, and thereby discover their nature and use in practice. Only as Reduction and Improbation of writings has an immediate connection with that mean of proof, I shall discourse of it next thereto ; and, as the Proving of the tenor of writings frequently is of importance to prevent or stop the heavy consequence of a Certification in such action, against the writings called for, and not produced, I shall treat of the same after it. And farther, the action of Reprobator of the testimonies of witnesses, tends to defeat that mean of proof ; and therefore, I shall subjoin it thereto for connection's sake. And lastly, as the benefit of a *Cessio bonorum* supercedes all personal execution against the debtor, and intitles him to his liberty, without necessity of refuge to the sanctuary, I shall treat of it immediately after that privilege.

SECTION VI. *Actions Declaratory,*

21. Declaratory actions of two kinds;

DECLARATORY actions may be considered of two kinds ; first, Those whereby the pursuer insists to have his right of property, servitude,

vitute, or any other interest declared in his favour. Of these it is commonly said, That a decree-condemnor, in such action, gives no new right to the pursuer, but only Declares what he had before, *Actio declaratoria juris, nihil novi juris tribuit*. But this does not hold in many of them: for example, a declarator of non-entry gives the superior right to possess the feude, and access to the whole rents and profits of the same, which, without it, he could not have. The other kind of declaratory actions is of those whereby the pursuer insists, That the defender's right may be voided, and the subject or thing in question declared to belong to himself, as in a declarator of contravention against an heir of entail, of irritancy of the feude or tack, *Ob non solutam canonem*; and formerly in recognition of ward-lands, for forfeiture of the whole feude, upon alienating more than the half. In these the foresaid observation by no means holds, but rather the reverse; for, by a decree in favour of the pursuer of such actions, the defender's right is voided, and the pursuer acquires a new right to the subject, which he had not before; because, tho' the fact or omission of the defender founds such action, yet it is only the Decree against him that infers a forfeiture of his right. I shall touch upon the most material of both.

how far it holds in such action, that nihil novi juris tribuit.

^a P. 1696.
c. 5.

THE declarator of most general consequence is that of Notour bankruptcy, founded upon the statute ^a. It is competent, at the suit of any of the party's creditors, to have it found and declared, by the court of session, That the defender is a notour bankrupt; and the circumstances specified in the act, to render him such, are, That he be insolvent, and under caption, and was either imprisoned thereon, or forcibly defended himself against it, or retired to a privileged place, or fled or absconded for his personal security. Such decree of declarator operates not only in favour of the pursuer, but of all the other just creditors of the bankrupt; for thereby All deeds granted by him, either at, or after his becoming bankrupt, or within the space of 60 days before, in favour of any of his creditors, for their satisfaction or security, are null and void. The pursuer has no farther interest than any of the other creditors, by the event of this action, which only lays open the subjects belonging to the bankrupt to the diligence of all the creditors. And therefore the same must be affected by arrestment, or other proper diligence, according to the nature of the subjects, either before or after the fraudulent deed is set aside by the declarator.

22. A declarator of notour bankruptcy; what required in order to it.

^b B. 1. tit. 10.
§ 113.

I HAVE observed elsewhere, that since one or other of the alternatives of the debtor's being imprisoned, &c. must concur at the date of the deed brought under challenge, therefore if the debt, for which he was incarcerated, was discharged before that period, the deed will subsist ^b; for then he is at full freedom. But if the party has been once committed to prison, tho' the creditor should thereafter set him at liberty, and perhaps supersede the diligence for some time, yet all the deeds granted by him after his imprisonment, or within 60 days before, for security or payment to such creditor, or any other of them, are void; for, notwithstanding such surcease, the truth is, that the debtor is still under diligence by horning and caption, and was thereon imprisoned, and so in the direct terms of the statute ^c; and to judge otherwise, were to give occasion to elude the statute.

23. What if the debt be discharged, or diligence superseded.

^c Nov. 8.
1750. Earl
of Hopetoun.

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I shall

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I shall add no more to what I have treated on this subject in the place just quoted.

24. Declarators of property not much used, except as a conclusion in a reduction and improbation.

THERE is a declaratory action of the Property or Superiority of lands, That it may be declared to belong to the pursuer; but it is not much used now in that form; because, if decree is suffered to go in absence, it is of little or no value. Only in actions of molestation, which concern disputes about marches, a declarator of property is frequently conjoined; and, in such case, the cognizance of those actions belongs to the court of session, which otherwise behoved to be carried on before inferior courts^a. In place of this declarator, reduction and improbation is mostly in use, of which I shall treat in another place, as aforesaid. The only defence against this declarator is a more preferable right in the defender, which must be produced and founded on.

^a P. 1587.
c. 42.

25. Declarators of redemption.

A MORE frequent declarator is that of Redemption of lands, from an incumbrance to which they are subject, to have it found and declared, That the same is legally redeemed. It proceeds either upon a Conventional Reversion in wadsets, and infestments of annualrents; or Legal, in adjudications, and depends upon the formality of the order of redemption, of which I have spoken at large in the proper place^b.

^b B. 2. tit. 10.

26. The defence against this action; can the defender plead any other rights in his person in bar of it.

THE defences here can only be objections to the legality of the order of redemption, or the pursuer's title to the reversion; for the defender cannot plead, in bar of this action, any titles in his person to the lands; because having attained possession upon the pursuer's right, he must cede it to him when that is purged. But it may be doubted, If an onerous singular successor in the wadset may not defend himself in the possession, by any other title in his person; for that he does not represent the wadsetter, and may use all his rights in his own defence; but, on the other hand, he can be in no better case than his author, and the records certiorated him of the reversion, to which therefore he must yield obedience.

27. Declarators of expiry of the reversion.

A DECLARATOR of Expiration of a reversion, whether conventional or legal, is a competent suit, and, in a temporary reversion, annexed to a wadset expired, this action is necessary, the irritancy being still purgible before declarator; but the same may be sufficiently understood from what is said in treating upon wadsets^c. And as to the legal reversion in adjudications, I have discoursed upon it likewise in the proper place^d.

^c B. 2. tit. 10.

^d B. 3. tit. 2.
sect. 3.

28. Declarators of trust; how far competent against singular successors in a trust of lands.

DECLARATORS of Trust are, in some sense, declarators of redemption; for thereby the trust-right is redeemed out of the hands of the trustee. Trusts granted after the statute^e can only be proved by the oath or writing of the trustee; and if it is against onerous singular successors of the trustee in lands, it will not proceed on a proof by his oath; nor upon his backbond of trust, unless the same was registred in the register of reversions, or that the purchaser knew the right was in trust; for thereby he becomes partaker of the fraud in not implementing the trust. The trustee may retain the right until he is refunded of his disbursements on account of the trust, in case they were necessary or pro-

^e P. 1696.
c. 25.

profitable, as to which the court will judge. I have discoursed fully of trusts elsewhere ^a.

^a B. 1. tit. 18.
§ 12.

THERE are divers declarators relating to Superiority, and its casualties, which may be sufficiently understood from what I have treated thereon ^b. A declarator of Non-entry was competent, by our old law of the Majesty, before the superior's own baron court ^c, and which took place in Sir Thomas Craig's time ^d; but now it can only be sued before the court of session. And the late statute ^e (if there was any difficulty before) undoubtedly renders baron-courts incapable to hold plea in actions of such kind. I have already discussed likewise the casualties of bastardy and last heir ^f, whence the declarators of the same may be apprehended.

^b B. 2. tit. 4.
^c Reg. maj.
1. 2. c. 63.
§ 8.
^d L. 2. dieg.
19. § 1.
^e 20 Geo. II.

^f B. 3. tit. 3.
sect. 3.

29. Declara-
tors at the
superior's in-
stance; that
of non-en-
try, of old,
competent
before the
superior's
courts.

DECLARATORS of Recognition, Disclamation and Purpresture, are at the instance of the superior, or his donatary, for declaring the fee, to have returned to the superior, on account of the several deeds, or feudal delinquencies inferring recognition, which is a general term, comprehending them all, and whereof I have treated in the proper place ^g.

^g B. 2. tit. 11.
sect. 2.

30. Declara-
tors of re-
cognition.

THAT parties may not forever be at uncertainty as to their rights, the law has provided, That a defender, cited in any summons, may, after the days of compareance are elapsed, obtain a Protestation against the pursuer for not insisting. This protestation being extracted, the Instance perishes; so that the pursuer can never thereafter insist in that summons, but may raise a new one to the same effect. The taking out such protestation is of use to cut off inhibition, or arrestment used on the depending action. After this protestation is extracted, a presumption arises, that the pursuer is disposed to harass the defender with fresh suits. Therefore, to secure the defender even from the ground of action, he may raise a declaratory action against the pursuer, to insist upon his pretended claim, with certification, That if he insist not, he shall never be heard thereafter in that cause. If the pursuer does not offer to insist in his action, he is said to be cut off forever, by a decree in the above terms; but otherwise a competent time will be allowed him to prepare himself. This is a similar remedy to that treated of by the Doctors, to secure a person against another's challenge or claim, and which they ground upon texts of the civil law ^h. By this, if one was defamed by another, or charged by him with any debt, he might bring an action against the party to make his charge good within a limited time, or be laid under perpetual silence by decree of the judge ⁱ. A more sovereign remedy than this action, is a Reduction and Improbation against such troublesome party, which will oblige him to produce all his grounds of claim; or they will be cut off by a Certification; which, to be sure, is vastly stronger than a decree in absence, upon the summons above-mentioned.

^h L. 33. ff. de
fidej. l. 5. c.
de ingen.
manum.
ⁱ Covar. var.
resolut. l. 1.
c. 18.

31. A protes-
tation for
not insisting,
and process
for declaring
that if the
pursuer of the
action insist
not, he shall
not thereaf-
ter be heard.

ACTIONS of Multiple-poining are likewise in effect declaratory. By those, persons who own themselves debtors or possessors of other mens effects, being in hazard of distress at the suit of different pretenders, call them all, in order to dispute their preference, and That
the

32. Actions
of multiple-
poining,
declaratory
ones.

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the pursuer may be found liable in once and single payment, and thereby he is secured against further danger; for payment to him who obtains a decree of preference, will have that effect, tho' in absence of the rest that are called. Those who recover by virtue of such decree will be liable to reduction at the suit of persons having a better right, but will be free from bygones, intermeddled with before citation, in the reduction of such decree, the same being *Fructus bona fide consumpti*, in virtue of the judicial warrant^a.

^a P. 1584.
c. 3.

33. When a writing is null, sometimes necessary to insist in a declarator of the nullity.

If a writing is null, as wanting the legal solemnities, the nullity may be proponed at any time, by exception or reply. But if a charter and seisin have past upon a null disposition, and possession is obtained, then the positive prescription may carry off the property of the lands; to prevent which, a reduction and declarator of nullity must be insisted in before the prescription is run.

34. Declarators of servitudes, and of immunity from them; when are they necessary. A possessory judgment takes place in respect to servitudes.

If one that has a Servitude upon another's tenement, is not in possession of the servitude, the heritor of that tenement will not readily submit to the servitude without a declarator of it. This action was termed *Actio Confessoria* by the Romans, as the action whereby one declares the freedom or immunity of his tenement from the servitude was called *Negatoria*. This last takes place where the party, on whom the servitude is claimed, denies or controverts it. If he, from whom the servitude is claimed, has been seven years in possession of liberty, the claimer of the servitude must insist in a declarator of it. As likewise must the heritor of the tenement from which it is claimed, in a declarator of liberty, if the other has been seven years in possession of the servitude; for the benefit of a possessory judgment takes place in respect to servitudes, as well as property. I have discoursed at large upon servitudes in the proper place^b.

^b B. 2. tit. 7.

35. Declarators of irritancy upon tailies necessary.

In tailies irritant clauses are frequent, and the Irritancy must always be declared before the next heir can have access to the possession; nor will he have any right to the intermediate profits, between the incurring the irritancy and decree of declarator. I have spoken of tailies elsewhere^c, to which I have no further to add.

^c B. 2. tit. 3.
sect. 11.

SECTION VII. *Petitory Actions.*

36. Petitory actions; the action of exhibition and delivery such. In what does the action, upon the pursuer's right of property, differ from an action upon a contract for delivery of a particular thing.

PETITORY ACTIONS are those "Whereby something is demanded to be done, performed, or paid by the defender to the pursuer," and are as many as there are rights, whether personal or real, that may found such demand, and be controverted in judgment. The action whereby the delivery of any thing belonging to us, in another's possession, is claimed from him, is the petitory action of Exhibition and Delivery. This differs from an action upon a personal contract for delivery of a particular thing, in this respect, That if, in the action founded on the pursuer's right of property, which is *Rei vindicatio*, the defender is absolved, upon compearance, it will be a *Res judicata* against him; so that he cannot insist in a new action for the same thing, unless in the former he had libelled only a special title of property, and insisted upon it alone. But tho' the defender be absolved from an action founded on a personal obligation, it is only a judgment against the pursuer

^a L. 139. ff. de reg. juris.

^b L. 14. § 2. ff. de rei vindic. l. 14. § 2. ff. de except. rei jud.

^c § 6. inst. de oblig. ex del. l. 17. ff. de rei vindic. l. 2. § 7. ff. mand. &c.

^d Voet. § 12. de rei vindic. Lewen. cens. lib. 4. c. 7. § 15.

purfuer as to that title; but he may thereafter infist on any other title he pleases: the reason is, because the same thing may be due to one by many different titles; but it can only be once his property, *Non ut ex pluribus causis deberi nobis idem potest, ita ex pluribus causis idem nostrum esse possit*, as the rule of law dictates ^a, and only those he infists on can be cut off by an absolutor against him in such personal action; whereas, one that libels the property to belong to him, without referring to any particular title, comprehends all the different ways whereby it could have accrued; and therefore the case would alter, if he libelled and founded only upon a particular title of property ^b.

THERE is this farther considerable, That where one founds his claim upon the property of the thing, in an action of exhibition and delivery, if he makes it good, he recovers the subject, without refunding the price. For example, the borrower of a horse, or any such thing, sells it, the owner will not be bound to restore the price, but the party is left to his recourse against the seller. Which, as it is plain from the civil law ^c, so it is conform to the custom of other countries ^d, and would seem to take place with us; whereas, if the claim is founded upon a personal obligation, a purchaser is safe against it, upon the principle, that *Mobilia non habent sequelam*.

AN action of Mails and Duties, or for the rents of lands, is petitory, for thereby we infist, That the possessors may be decreed in payment of their rents to us. If the pursuer is already in possession, the action is in pursuance of the possession, and to continue it, and then indeed it is properly a possessory action, as in suing one's own tenants for their rents; but if, on such occasion, any Competition of rights occurs, it renders the action undoubtedly petitory. This action may be founded upon as many titles as there are different rights to lands, or rents thereof; and in it any of the defenders, or third parties may compear, and exclude the pursuer, if they have a preferable right to his, and competitions are for most part brought in by this action. If the pursuer's right is only an assignation to the rents, he must found on his author's right to the lands, which gives him title to the rents, and therefore the author's singular successor in the lands will be preferable to such assigney.

POINDINGS of the ground are similar to mails and duties, but proceed upon different titles, and have a stronger effect. They might have been treated amongst declaratory actions. The defenders who are chiefly the possessors, (the heritor being called for his interest only) are not decreed in payment, but only letters of poinding and appraising are ordained to be directed for distraining the goods upon the lands, in payment of the bygone annualrents, or other *debita fundi*; but, the intent being for payment, they may justly be esteemed petitory actions in a different view. I shall consider them a little here, so far as may be suppletory to what I had occasion to mention on this head elsewhere ^e.

^e B. 2. tit. 5.

IF a parcel of the goods on the ground do not belong to the possessor, they ought not to be distrained, provided there be sufficient of his own upon the lands to answer the demand of the letters; but, if

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not,

37. When is the pursuer of an action of exhibition and delivery liable to refund the price.

38. The actions of mails and duties sometimes petitory, and at other times possessory. Competition of rights frequently comes on by such action.

39. Poindings of the ground may be taken, as either declaratory or petitory actions.

40. In case the possessor has no goods of his own upon the

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lands, those of strangers pasturing thereon may be poinded; this not the case in poindings upon personal decrees.

not, it would seem, that the goods of strangers graffed thereon, for mail or rent, may be poinded for the *debita fundi*, upon letters of poinding the ground; because otherwise the creditor's diligence might be eluded, and which was accordingly found by the court of session^a. This will not hold in poindings for personal debts; for there, if the messenger proceed to distrain, after another offers his oath upon the property of goods intended to be poinded, he is guilty of a spuilie; because, in such case, the person of the debtor is only liable, and therefore his own goods can only be distrained; whereas, in the other, the ground of the lands is subject to the debt, which consequently must affect all the goods thereon.

^a July 11. 1628. lady Ednam.

41. Letters of poinding the ground may be put to execution without a previous charge, and are perpetual.

LETTERS of poinding the ground may regularly be put to execution every term, without any previous charge against the tenants to make payment; because truly there is no decree against them Personally, which could be the foundation of a charge to make payment. And for the same reason, these letters are perpetual, and may still receive execution, tho' the tenants and heritor, against whom the decree and letters were obtained, should alter, and others come in their place.

42. The preference among real debts, how ordered. One that has letters of poinding cannot be stopt in executing the same, by another having a preferable infestment, but no such letters.

Debita fundi, or real debts, by the deeds of the party, are preferable, according to the dates of the registration of the infestments whereby they are constituted, as I took notice in the above quoted title. And shall only add, That tho' the bygone annualrents, for which the poinding proceeds, had become due after the annualrents on a later infestment were payable, yet such bygoners are preferable, in respect of the first infestment; so that, in competitions, the prior infestment will be preferred, as to the rents that are in the tenants hands, or still *in medio*, as lawiers speak. But, this notwithstanding, if a creditor, in a later infestment, offers to poind the ground, he cannot be stopt by another who has right to a prior infestment of annualrent, but has not obtained a decree and letters of poinding the ground: for, tho' the dates of decrees for poinding the ground, or of adjudications for bygone *debita fundi*, give no preference, and the priority of the infestments is the only rule, where the competition occurs touching a subject still extant; yet the diligence of the creditor, who has *parata executio*, must proceed, and the other cannot interpose at his own hand to prevent it, and such creditor is preferable, as to what he so receives; and the law favours the vigilant, *Jura vigilantibus subveniunt*.

43. Adjudications for personal debts.

ADJUDICATIONS for personal debts may seem rather declaratory than petitory actions; for there is nothing decreed personally against the defender; but they may be deemed likewise petitory, because generally they are led in order to payment or security of the debt, and, in such case, they can only proceed upon a personal obligation for payment. Adjudications have been already considered as judicial conveyances^b, and therefore I shall take notice of them but briefly here. The defender has a faculty to produce a progress to lands to the value of the debt, and a fifth part more free of incumbrances, which, if he do at the term assigned for that end, a proof of the rental and value will be allowed, and the defender must enter the pursuer

^b B. 3. tit. 2. sect. 3.

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^aP. 1672.
c. 19.

pursuer to the possession, and this is called a Special adjudication, and the lands are redeemable only within five years. If a progress is not produced at the term, in order to a special adjudication, all the lands libelled will be adjudged, as they were formerly in use to be appraised, redeemable within 10 years ^a, which is called a General Adjudication. The summons of adjudication is executed as any other ordinary summons.

THE statute bringing in general adjudications upon personal bonds, within year and day of the first effectual one, *pari passu*, sometimes is pernicious to the debtor; because all to whom he owes hasten to adjudge, that they may not be excluded by expiration of the year and day; but all second adjudications are summarily called and decreed. that they may not lose the privilege, reserving all defences against the debt *Contra executionem*, i. e. in any action of mails and duties, or competitions arising touching the rents. After expiration of year and day from the first effectual adjudication, all adjudications are preferred according to their dates, and not *pari passu* with these within the year with them; and this was the law of old in all cases.

44. The statute bringing in adjudications within year and day, *pari passu*, frequently pernicious to debtors. After year and day, all adjudications preferred according to their dates.

THOSE diligences frequently bring on actions of ranking and sale of bankrupt estates, which are petitory in the strongest sense. A decree of sale, in such case, is an adjudication, for thereby the lords of session adjudge the estate to belong to the purchaser, but without any legal reversion. I have discoursed of this momentuous action elsewhere ^b, and shall have occasion to touch upon it hereafter likewise ^c.

45. Ranking and sale of bankrupt estates.

^bB. 3. tit. 2.
sect. 8.
^cInfra tit.
real execution.

THERE is a petitory action for tithes, at the instance of the minister having right to a parsonage, titular or tithe-master; and at the suit of stipendiary ministers for their stipends; and an action of spuilie of tithes likewise takes place; of all which I have spoken at large elsewhere ^d.

46. A petitory action for tithes or stipend.

^dB. 2. tit. 8.
sect. 8. 10.

No doubt, actions of Deforcement, and on other delinquencies for damages, treated of in the first book, are petitory actions; but may be sufficiently understood from what is there said touching them ^e. Actions of hypothecation are at the instance of the persons intitled thereto, against the intermeddlers with the subjects of hypothecs, of which I have treated fully in the proper place ^f.

47. Petitory actions for damages upon delinquencies; and upon hypothecations.

^eB. 1. tit. 10.

^fB. 1. tit. 17.

AN action of debt is a most extensive petitory one. This suit is called *Condictio* in the civil law, and such denomination may be given to all actions on personal rights, but more properly to such as are for payment of debts; the most intricate of these is, That for count and reckoning against tutors, curators, factors, and creditors in possession. Such action of old was almost inextricable; but now, by the excellent rules of court in the act of federunt to that purpose, is made easy.

48. Actions for debt petitory; counts and reckonings; the most material of these, formerly almost inextricable; now by the forms made easy.

^gNov. 22.
1711.

SECTION VIII. Actions Possessory, and Interdicts.

ACTIONS Possessory are Such, wherein the pursuer need not dispute or argue the point of right, but only possession. Some of them require

49. Some actions possessory require

a title in writing, others not; the possessory action of mails and duties may become petitory, by a competition ensuing.

require a title in writing, as actions of Mails and Duties, Removings and Molestations. Others require nothing but possession, as spuilies, ejections, intrusions, and succeeding in the vice. The possessory action of mails and duties differs nothing from the petitory one upon the same head; only here, the pursuer that has been in possession needs produce no more than his seisin against the possessors. And, if any other compear to claim a preference on the rents, the pursuer must produce his other titles, and it becomes then a petitory action, and a competition of rights will ensue, as I formerly observed. But the pursuer may reply upon the benefit of a possessory judgment, and thereupon prevail, in the mean time, and enjoy the rents, till a reduction is regularly sued, and his right set aside.

50. Interdicts originally granted by the pretor touching possession; thereafter possessory actions introduced. The property and possession could not be conjoined in one by the civil law; what is the case by ours.

THE civil law was delicate, as to keeping distinct the question of possession and property, for That of possession behoved to be summarily first discussed. This, of old, was done by the Pretor, who interposed his interdicts, awarding the possession to one of the parties, and enjoining the other not to molest him, in the mean time, until he sued, and prevailed in an action for evicting the property: and as, by that law, generally no Cumulation of actions was allowed, so neither could a petitory and possessory action be conjoined in the same libel^a. At last, the formal way of the pretor's interposing his interdicts or injunctions touching possession was abolished, and possessory actions *In factum*, *i. e.* On the case, in place of them, were granted to the party, who was molested in his possession, to ascertain it, or recover the same^b. Our possessory actions are of the same nature with these, only we follow the Canon law, whereby cumulation of actions was allowed^c; for one may conjoin the possessory and petitory or declaratory actions together in one libel, as is frequently done.

^aL. 62. ff. de judic. l. pen. c. de interd. l. 1. § 1. ff. uti possidetis. ^b§ p. inst. h. t. de interd. l. p. et ult. c. eod. tit. ^cCap. 6. ext. de causa possess. et propriet.

51. Those possessory actions, either public or private; the interdict, *Quorum bonorum*; after the example of it the possession of the ancestor is continued to the heir with us.

INTERDICTS, or the possessory actions that came in place of them, were either Public, which any of the subjects might prosecute, as encroachments on the public rivers and high-ways^d; or Private, which concerned only private persons interest, these were either *Adipiscendæ*, *Recuperandæ*, or *Retinendæ possessionis causa*, *i. e.* for acquiring, recovering, or retaining the possession. The first, for attaining the possession termed *Quorum bonorum*, was competent to the heir, or *Bonorum possessor*, *i. e.* who was such by the grant of the pretor; the intent of it was to obtain the real possession of the subjects of the inheritance, that were possessed by the ancestor at his death^e. After this example, by our law, the possession of the ancestor is deemed, in a certain respect, to be continued to the heir; so that the heir of the investiture is intitled to remain in the possession of the estate, till another in a proper action evict it from him^f. And consequently, if any other assume the possession, the heir may summarily recover the same, as by an interdict; but frequently, if any dispoinee from the deceased compears, and his title is under challenge; or if different heirs contend about the succession, the lords of session Sequester the subject, in the mean time, till the competition is discussed^g.

^dTit. ff. de locis et itin. publ. tit. ff. ne quod in loca publ. &c. tit. ff. de flum.

^eTit. ff. quor. bonorum.

^fJuly 18. 1727. Ogilvy. Fount. June 24. 1698. Hume.

^gFount. Jan. 11. 1712. lord and lady Hawley.

52. Or for recovering possession; the case by the

NEXT, interdicts were granted for recovering the possession which the pursuer once had, but was deprived of violently by the other party's dispossessing him. And, by the civil law, if the defender was owner

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^a § 6. inst. h. t. tit. ff. de vi, et vi arm. tit. 6. unde vi.

owner of the subject, he lost his property to the pursuer; and if he was not, he was subjected in the value of it: such was the care of the legislature to prevent violence and tumults^a. This interdict, *Unde vi*, as it was called, took place only in Ejection from houses or lands; for, as to moveables, the action *vi bonorum raptorum*, or that of theft, was competent; our actions of ejection, intrusion and spuilie, are similar to these.

civil law of a violent dispossessor in lands or houses; in place of these we have actions of ejection, intrusion and spuilies.

^b § 4. inst. h. t. tit. ff. uti possid. et utrubi.

THE interdicts for retaining the possession were *Uti possidetis* as to lands, and *Utrubi* as to moveables, which differed a little of old; but were thereafter equiparated^b. By these, the party that was in possession, at the time of litiscontestation, neither Violently, Clandestinely, or Precariously, in respect of the other party, was maintained in possession; and therefore the adverse party was put to dispute the property in a petitory action, tho', at the same time, perhaps the defender might have a vicious possession with respect to third parties. And the reason is plain, for even such possession is better than none, which is the case of the competitor; and it is *jus tertii*, none of his concern what right other persons have to the property or possession^c. Our action of molestation has some resemblance to the interdict, *Uti possidetis*, or the possessory action in place of it; for this concerns *Turbulence* in the possession of properties and communities, as the statute bears^d. However, we join with it commonly a declarator of the property, which is allowed by our forms. As to moveables, we have no occasion for the interdict *Utrubi*; because the possession of them presumes the property; so that the possessor retains his possession of such things, without regard to the time of his possession, unless the pursuer prove that the same proceeded from him otherwise than by transmission of the property.

53. The interdict *uti possidetis*, for retaining possession; similar to it is our action of molestation; in moveables, no occasion with us for this interdict.

^c L. 1. § fin. l. 2. ff. uti possid.

^d P. 1587. c. 42.

AN Incident order, in way of an interdict *uti possidetis*, is granted by the court of session, when the pursuer, during the dependence of a suit touching the property of any subject, encroaches on the defender's possession in whole or in part; or, on the contrary, the defender alters the possession in prejudice of the pursuer: for example, if, pending a declarator of property, the pursuer assumes the possession of the subject; or if, during the dependence of a declarator of thirlage, the defender erects a mill on the lands in question, the lords, in either case, will enjoin matters to be put *in statu quo*, viz. in the former state, and that the possession shall continue in the same condition as at commencement of the suit, till its final issue; for the rule is, *Nihil innovandum, pendente lite*.

54. Incident interdicts frequently granted by the lords, in relation to subjects in suit before them; instances of such.

^e B. 2. tit. 1. sect. 3.

I HAVE discoursed fully of the advantages of possession in another place^e, and shall only here observe, That the Possessory Judgment there mentioned is more beneficial to the possessor of lands and heritages, than even the interdicts among the Romans; for if one has a competent title, and has been seven years in possession, he has right to continue it till his titles are reduced, That being the benefit of a possessory judgment.

55. The possessory judgment with us more beneficial than the interdicts among the Romans.

THE most important possessory action is, that of Removing tenants and possessors of lands, or other tenements. It is competent upon in-

56. The most important possessory ac-

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tion is that
of removing;
the title in it;
the variation
in it by the
late act.

feftments of property or liferent, or equivalent rights, as the Terce and Courteſy. This action hath been diſcuſſed at large ^a; but as to the terms of removal, it muſt be obſerved, That as to all leaſes now ſubſiſting, or which ſhall be entered into before the 14th day of September 1752, the terms of commencement, expiration, or determination of the ſame, continue as at preſent, by an expreſs proviſo in the late ſtatute ^b, and are not accelerated 11 days, as by the new Calendar, therein eſtabliſhed, obtains in other caſes. But in leaſes to be granted thereafter, the terms of Whitſunday and Martinmas, or other terms, are regulated according to that ſtandard; ſo that the day which at preſent is the third of May will then be the 15th of that month, and the 30th day of October will then be the 11th of November, and ſo of the other terms, the ſame being accelerated 11 days by the foreſaid ſtatute; and warning and actions of removings muſt be directed accordingly.

^a B. 2. tit. 9.
§ 3.

^b 24 Geo. II.
c. 33.

57. Actions
of ejection,
intruſion and
ſpuilie, poſ-
ſeſſory.

EJECTIONS and intruſions are redreſſed by poſſeſſory actions on thoſe heads. I have treated fully elſewhere upon theſe actions, as I have likewiſe done as to actions of ſpuilie ^c.

^c B. 1. tit. 10.
ſect. 7 and 8.

SECTION IX. *Actions Acceſſory and Incidental.*

58. Actions
acceſſory;
actions for
tranſumpt
ſuch; the
nature and
effect of
them; an
extraſt out
of the gene-
ral register,
or even that
of probative
writs, equal-
ly good as a
decree of
tranſumpt;
the requiſites
to it.

THOSE are the moſt important ordinary actions; but there are actions which may be termed Acceſſory, as referring to others that are the Principal. Actions for Tranſumps are acceſſory; becauſe a decree of tranſumpt, if quarrelled, muſt be ſupported by the principal writings tranſumed, and ſupplies it. A decree of tranſumpt is of the ſame import with the extraſt of a writing regiſtered in the proper register; for it is probative, unleſs improbation is offered, in which caſe the party may, on a diligence, recover the principal, and, if he cannot, certification will go in courſe. In both caſes this danger may be prevented, by repeating a Proving the tenor, and then either the extraſt or tranſumpt will be important Adminicles. But there will be a diverſity as to the *Cafus amiſſionis*: for, in the caſe of a writing recorded and left in the register, the loſs of the principal is evident, viz. That it has been miſlaid by the keeper of the register; but in that of a tranſumpt the loſs muſt be proved. In actions for tranſumps, the parties chiefly intereſted in the writings muſt be called, or expreſſly conſent to their being tranſumed ^d. It is neceſſary, only where parties reſuſe to register the writings in which others have a partial intereſt; for now, when all writings are regiſtrable, as probative writings, an extraſt out of that register is as probative as a decree of tranſumpt: and in reſpect to the *Cafus amiſſionis*, they are perfectly ſimilar, the principals in neither caſe being in the record. A decree of tranſumpt muſt contain the full Tenor of the writings, whether decree, bond, contract, charter, or other deed, and ſet forth, That the judge compared the ſame with the principal tranſumed, and that they agree, and therefore he Authenticates it to be holden for the principal, to the effect above mentioned.

^d Fount. Dec.
13. 1699.
Telfer.

59. Exhibi-
tions by inci-
dent.

PROCESS of exhibition, and delivery of writings, is a principal action, of which I have treated already ^e; but exhibition *Ad deliberandum*, or *ad probandum*, is only acceſſory. This laſt, as to probation,

^e B. 1. tit. 2.

is

TIT. XXIV. Actions Accessory and Incidental. 623

is now discontinued; because, in place of it, by the regulations 1672, Incident Diligence, by horning and caption, is granted to parties against all Havers, for producing the writings necessary for probation in all actions, which formerly was done by process of Incident. There is likewise an incident diligence granted against witnesses, to compel them to come in and depose, of which I shall afterwards discourse^a. The lord Stair has fully set forth the former tedious procedure against havers of writings and witnesses, before the regulation aforesaid^b, for which the curious reader may resort to him.

^a Inf. tit.
(proof by
witnesses.)
^b B. 4. tit. 41.

EXHIBITION *Ad deliberandum* may well be termed Accessory; because it is intended with a view to another action, for recovering the predecessor's estate; but of this I have discoursed already^c.

^c B. 3. tit.
4, 5.

A SUMMONS, called *Prevento termino*, is an accessory action. It was used of old, when suspensions were generally past to a long day of comparance, and the charger intended this process, to oblige the suspender to insist in his suspension before the term, whence it had its name. But now, by the Regulations, a suspension sits procedure only for a month or thereby, so that the charger may have it discuss in common course, and therefore this action is in disuse.

60. Exhibitions ad deliberandum.

61. Actions preventivo termino; they are unnecessary at present, and disused.

ADVOCATIONS are purely incidental and accessory actions, the question in them being, Whether the principal action shall be brought before the superior court, or remitted to the inferior one? but of these I shall speak at large hereafter^d.

^d Inf. tit.
(advocations).

ACTIONS of Transference are accessory to the principal causes, which must stop till they are transferred. They were of old necessary upon the death of the pursuer, and were in that case termed Transferences *Active*; but now these are abolished, so that the process goes on where it last stopt, at the instance of the heir, executor, or singular successors that produce their titles, without such preliminary^e.

^e P. 1693.
c. 15.

62. Advocations incidental or accessory actions.

63. Actions of transference active now abolished, and the heir or singular successor may directly insist.

UPON the death of a defender, during a dependence, the action must be Transferred against his heirs or executors *in statu quo*, reserving all defences, both against the passive titles, and in the principal cause. It cannot proceed against the heir, till after the year of deliberation; and the pursuer ought to execute a general charge against him, before he serves the transference, unless he is sure to subject him otherwise to the passive titles. This transference is a matter of course, that the suit may proceed in the state it was in, when the party against whom it depended died; but no decree is extracted on it, but only a simple interlocutor, given by the ordinary in course, Transferring the cause *in statu quo*, Reserving all defences; and thereafter the suit proceeds before the ordinary in the cause, as if it had been an original action upon the passive titles against the defender.

64. Transference passive.

ACTIONS depending before inferior courts may be transferred before them, if the representatives live within their jurisdiction. But otherwise the cause must be advocated to the court of session, and transf-

65. How must actions before inferior courts be transferred.

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transferred by them, and proceeded in to a decree in the principal cause^a.

^a July 21.
1631. Anderfon. Gosf.
Jan. 9.
1674. Denholm.

66. A summons of wakening necessary, when the process lies over for year and day. A decree needs not be wakened.

A SUMMONS of Wakening is of the same nature; for it is a revival of an action which had been discontinued for more than one year, in which case it is, in our stile, said to Sleep: after the process is wakened, it goes on as the same stood when it slept. After decree the action cannot sleep; for the decree may be extracted, without farther application to the judge.

T I T. XXV.

Procedure in Ordinary Actions, till Probation.

1. The general course of proceeding in actions.

HAVING described the manner of bringing actions before the court of session, and the nature of the most remarkable Ordinary actions competent to be sued before them, I shall now proceed to the method of discussing them, after they are brought in judgment; and thereafter I shall discourse upon the Proof frequently taken in virtue of acts of litiscontestation, or other acts pronounced in the course of procedure; and till such probation is brought, and advised by the court, or the party on whom it was incumbent, concluded by judgment of the court for not bringing it, (which, in our law-language, is called a Circumduction of the term against him) no decree can be awarded.

2. The first question in an action moved in judgment is, if it is regularly brought before the court: this concerns declinators, and other dilators; the effect of a dilator sustained.

WHEN a cause comes to be disputed, the first question is, If it be regularly brought before the court? This comprehends all Dilatory defences, termed with us No Processes. Those either concern the jurisdiction of the court, and objections against the judge, specially termed Declinatures, or Objections against the pursuer's titles; or, lastly, the Order of the executions, and other procedure in bringing the cause before the court. I have already treated of declinatures^a, and the other kinds of dilators may easily be understood from what I have said of Citations, and upon particular actions. If the court sustain the dilator, they either find *No process*, which absolves the defender from that Instance, *i. e.* from that particular action, as wrong laid, but does not bar a fresh one upon the same subject; or remit the cause to the proper judge; or give their interim order, according to the nature of the dilator.

^a Sup. tit. 2.
§ 37, &c.

3. All dilators, not instantly verified, must be proponed peremptoriae cause.

IT is to be observed, that all dilatory pleas ought to be instantly verified; for otherwise they must be proponed *Peremptoriae causæ, i. e.* That, if the defender succumb in the proof of such Plea, decree shall go against him, in the same manner as if the plea, in the proof of which he failed, had been a Peremptory defence upon the merits. Without such regulation, law-suits might unreasonably be protracted.

4. Where no dilator lies, the merits of the cause are

IF no dilators stand in the way, the Merits of the cause come to be debated, and the Relevancy of the libel, exceptions and replies, or farther allegations or pleas made for either party, are advised and determined

determined by the ordinary, or by the whole lords, if the case is brought before them. Relevancy of the libel, or declaration, is "The Justice or Sufficiency in point of law, of the matters therein laid, in order to obtain a decree-condemnator." Relevancy of the defence is "The justice of the allegation therein made to take off the grounds in the libel, and procure a decree-absolvitor;" and of the reply, To exclude the defence. If the allegations found relevant are instantly verified, decree will proceed without any act of litiscontestation, which is only in order to a proof.

proceeded to, relevancy of a libel, exceptions or replies; what if the allegations found relevant are instantly verified.

LITISCONTESTATION properly is made by the defender's compareance, and objecting to the pursuer's libel or claim, or proponing peremptory defences against it, and thereon may follow a decree *in foro*, i. e. upon compareance, without any proof taken in the cause upon either side, viz. Where the pursuer's libel is not found relevant; or where the pleas made by the defender are found irrelevant. In the first case, there follows a decree-absolvitor in favour of the defender; and in the second a decree-condemnator against him. A Peremptory defence is That which, if true, puts an end to the cause, *perimit causam*. But our Formalists commonly restrict the term Litiscontestation to the case where an act is extracted, in order to a proof, after the relevancy of the points to be proved is determined. This is termed an Act of Litiscontestation, but that cannot hinder litiscontestation from being truly made, even where no act is extracted; but the defender's allegations either repelled as irrelevant, or taken off by the pursuer's reply, or sustained and instantly proved: and this is clearly defined in the canon law, as well as in the civil, *Per petitionem in jure propositam et responsionem factam* (says the Decretal) *contestatio litis fit*^a, which is in effect a transcript from the civil law^b; and indeed the nature of the thing shews it, for where the cause is contested, litiscontestation must happen. I shall touch on the effects of it elsewhere^c.

5. Litiscontestation is made upon the defender's compareance, and making a peremptory defence; but commonly understood, where an act of litiscontestation is awarded in order to proof.

^a Cap. 54. ext. de elect.
^b L. 1. c. de litiscontestatione.
^c Inf. tit. last, rule 39.

IF the relevancy is very doubtful, or contrary allegations in fact are made by the contending parties, an Act before answer to the relevancy, in order that the facts may be ascertained, will be pronounced, and a conjunct probation allowed to each for proving their respective allegations. And after the proof is led, both relevancy and probation will be advised together, in order to a sentence. After an act, tho' before answer, no new allegations, not instantly verified, will be allowed; or, if they are, it must be upon payment of full costs; because otherwise, causes would be very much delayed, to the great damage and expence of parties^d.

6. If the relevancy is doubtful, an act before answer is granted to both parties to prove, and the proof, with the relevancy, jointly advised.

^d Act of fed. July 23. 1674.

THE Exceptions, or Peremptory defences, that may be competent against all actions, appear from what has been fully discoursed in the preceeding books, of the several rights and defects of them, and in this book of the particular actions; and therefore, I shall only discourse a little upon the *Exceptio rei judicatae*. This exception lies, Where the case that was formerly judged between the parties, or their authors, is sought to be judged again, while that judgment remains unreversed; for it cannot be brought under cognizance again, the rule being, that *Res judicata pro veritate habetur*^e, the judgment

7. Exceptions, or peremptory defences. The exception of *res judicata*, in a general sense, applicable to all decrees; but, in a more restrained acceptance,

^e L. 207. ff. de reg. juris.

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applied to
decrees in
foro before
the lords of
session.

of a court is held to be true and just. It may be applied to all decrees proceeding upon citation of the parties, tho' before inferior courts, or even to decrees in absence: but, since these may be easily laid open, suspended or reduced, it is more properly understood of decrees before the lords of session *in foro*, or other superior courts of justice, which regularly cannot be otherwise altered, than by Appeal to the house of lords. By such judgments the point determined is fixed and unalterable, according to the ordinary course of justice, and the extraordinary remedy competent by appeal does not obstruct execution of the judgment; unless a writ of appeal is actually served, after which execution must sist till it is discussed.

8. This exception uniformly takes place against defenders; but, as to pursuers only, with respect to the titles or grounds insisted on by them in their actions.

THIS exception takes place uniformly against defenders; because, what was Proponed and Repelled, or Competent and Omitted in a decree *in foro*, cannot regularly be afterwards received^a. But, as to the pursuer, his right is no farther cut off, than as it was brought into judgment. Wherefore, if one has many titles to the same subject, or divers grounds of reduction of the same right, only That which he insists upon, and is over-ruled in, can be set aside by the *res judicata*; but he may still insist in a new action upon the other grounds or titles competent to him, without hazard of being excluded by the former judgment.

^a P. 1672.
c. 16. regul.
concerning
the session,
§ 19.

9. A decree-absolvitor in absence, affords the defender exception against the pursuer in another action upon the same grounds.

HOWEVER, if a pursuer is cast in his action, upon advising the merits of the cause, it will be *res judicata* against him as to all points decided, even tho' there was no compareance for the defender. For notwithstanding that, in such case, if the decree had been given against the defender, it had been in absence, so far as concerned him, because he was not appearing; yet, as to the pursuer, it must still be a decree upon Compareance, he having brought the action; and he had the advantage, that no appearance was for the defender to make objections against the relevancy of the libel, or the insufficiency of the proof of the same^b.

^b Jan. 1735.
Craick contra Craick.

10. The import of the rule, *Res inter alios acta vel judicata, aliis non nocere*.

IT is a rule, that *Inter alios acta vel judicata aliis non nocere*, conform to the rubric, and whole laws in the title of the Code so inscribed, which imports, That transactions or judgments can only have effect, with respect to the parties between whom they intervene and their representatives. By this rule, a decree against, or in favour of one or more creditors or debtors for the same sum, or in the case of more co-heirs, will not be prejudicial or beneficial to the rest who were not parties to the suit; and it can only be regarded as a Precedent in respect to them.

11. If the depending action was intimated to the author, the decree therein deemed as *res judicata* against him.

BUT if, with the concurrence of the author, a suit is carried on, either for or against a singular successor, the judgment will operate a *res judicata* to or against the author, with respect to the warrandice to which he is liable, or the like^c. But otherwise, where there is danger of the right's being evicted, the action ought to be intimated by the defender to the author, under form of Instrument, or by Incident diligence, during the dependence, for citing the author to defend the singular successor from the eviction; or otherwise the sentence will not have the force of a judgment against him. So that, in order

^c L. 63. ff. de
re judic.

TIT. XXV. Observat. on the Law of England, &c. 627

order to exclude recourse, he may propone any defence that was competent against the eviction; but if he had none, the recourse will proceed against the author, in the same manner as if the distress had been intimated to him.

DECREES before foreign courts cannot found this exception, to exclude a new suit for the same subject here; because the authority of *Res judicata* proceeds from the jurisdiction of the courts where the decrees are pronounced; and consequently, where That takes no place, neither can their judgments be regarded as *Res judicatæ*. Therefore, when judgment, in order to execution, is demanded before our courts, upon foreign decrees, any thing omitted, or wrongfully sustained or repelled, may still be taken into consideration here, and the defects in them supplied from material equity ^a.

^a Hume de-
cif. 21.

BUT if decrees of foreign courts have already received execution, so that no judgment here is necessary for that purpose, our courts cannot review their decrees in order to obtain restitution; because, in that case *Par in parem non habet imperium* ^b. And if any injustice is done by execution upon such decrees, there is place only for redress, to be demanded by the sovereign to whom the person injured belongs, from the sovereign power of the nation where the decrees complained of were given; and, upon denial of such Request, letters of Reprisal are issued, of which I have discoursed in another place ^c.

^b Nov. 1731.
C. Hamil-
ton against
D. East-India
Company.

^c B. 2. tit. 2.
sect. 1.

12. Decrees
before fo-
reign courts
no *res judi-*
cata against a
fresh suit
here, upon
the same
ground.

13. If such
decrees have
taken effect
by executi-
on, the only
remedy is by
letters of re-
quest or re-
prisal.

THE exception of *Lis alibi pendens* is somewhat of a similar nature to that of *Res judicata*. It is Where the same cause is depending before another court. It may be taken off or prevented by the party's passing from that suit; but that will not hinder the defender from taking the benefit of all the interlocutors in his favour, in the process deserted by the pursuer. But it would seem that the pursuer cannot take the advantage of any in his favour, since he has disclaimed the whole procedure.

14. The ex-
ception of
lis alibi pen-
dens; how
is it taken off
or prevented.

Observations on the Law of England, in relation to the Premises.

FOR the dispatch of justice, by the law of England, every Dilatory plea, whereon issue is joined, and which receives trial in any action, before the courts of law, shall be Peremptory, let it be of what nature soever. So that if it is found against the defendant, a peremptory judgment shall be given against him, even tho' he be an infant, and not a *Respondeas ouster* ^a.

^a Bac. new
abr. (infan-
cy) p. 163.

PLEAS in Abatement (as dilatory pleas are called in the law of England) are put in by the defendant, To shew cause to the court why he should not be impleaded, or if impleaded, not in the manner and form he there is. Such are either to the jurisdiction of the court, or to the person of the plaintiff, as That he is an outlaw or alien, &c. or they concern the person of the defendant, as That he is a privileged person, or that he is not duly named, or has not a proper addition; but, in such case, he must set forth his right name and addition ^b. Such pleas are not only laid under the above-mentioned restriction, That when issue is joined on them, if it be found

1. By the law
of England,
every dila-
tory plea,
whereon is-
sue is join-
ed, shall be
peremptory.

2. Pleas in
abatement, of
divers kinds,
by the law of
England;
some of them
specified:
they are laid
under several
regulations.

^b Id. (abate-
ment) p. 3,
&c.

against

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against the defendant, such dilatory plea shall be peremptory; but likewise divers other restraints are laid upon them by statute^a, to prevent their being calumniously put in, or being vexatiously insisted in.

^a 4 and 5
Annæ, c. 16.

3. The case of a plaintiff, his being non-suited; the defendant, in such case, recovers his costs.

A PLAINTIFF delays his own cause, if he suffers himself to be Non-suited. This happens when, upon the trial, the jury are ready to give their verdict; but the plaintiff does not appear, and then his Default is recorded, upon which the suit is dismissed, and the defendant recovers his costs; but the plaintiff is not barred from bringing a new action for the same cause^b.

^b Bac. new
abr. (non-
suit) 678.

4. Pleas, either general or special.

PLEAS are either General or Special. General, as in a trespass upon the case Not Guilty, in debt upon a bond *Non est factum*, &c. Special Pleas, are, Where the defendant sets forth the matter pleaded at large; and, if he hath cause of justification, he must not plead Not Guilty, lest, upon evidence, it be found against him. But he ought to plead the special matter, and so confess and justify what he hath done, as in a battery, That he did it in self-defence, &c^c.

^c Coke 1.
inst. 282.
5 rep. 119.

5. If a plaintiff sue two writs against a defendant, for the same thing, the second shall abate.

THE law abhors multiplicity of actions; and therefore, whenever it appears that the plaintiff hath sued out two Writs against the same defendant, for the same thing, the second writ shall abate; for if it were allowed that a man could be twice arrested, or twice attached by his goods for the same thing, he might, by the same reason, suffer *In infinitum*. But an action, depending in an inferior court, cannot be pleaded to an action brought in one of the courts of Westminster^d.

^d Bac new
abr. (abate-
ment) 13.

6. The import of the relevancy or irrelevancy of a libel, or defence, similar to a party's joining a demurrer in the law of England; the effect of joining a demurrer.

THE Relevancy, or Irrelevancy of a libel or defence, is its sufficiency or insufficiency in law, to infer what is contended by the pursuer or defender, on supposition that the facts alledged were proved; and to argue the same in judgment, is somewhat similar to the parties in a suit, Joining in a Demurrer before the courts in England. Thus, where the party is advised, that the Count of the plaintiff, (*i. e.* his libel or claim) or plea of the adverse party, is insufficient in law, he Demurs or abides, and refers the same to the judgment of the court. But if the Count or plea is sufficient, and the matter of fact is denied, then the adverse party takes Issue thereupon, which is tried by the jury. And as there is no issue upon the fact, but where it is joined between the parties, so there is no demurrer in law but where it is joined. For when a demurrer is offered by the one party, the other must join with him, and thereupon the demurrer is said to be Joined, and the court, upon advising the same, give a final judgment in the cause^e.

^e Coke 1.
inst. p. 71.

7. The diversity between arguing upon the relevancy, and sustaining it before our courts; and the joining a demur-

THE diversity between the two methods of procedure is, That he who offers a demurrer must admit the fact laid in the adverse party's count or plea to be true. Whereas, with us, he that pleads against the relevancy of a libel or defence does not admit the facts whereon the same are founded, but only argues Hypothetically, *viz.* That supposing they were proved, yet they would not be sufficient in law to infer the conclusion of the libel, or to operate a defence against it.

So

So that tho', in consequence of such arguing, the libel or defence shall be sustained relevant, yet the party must still prove his libel or defence; for it is only to superceed an unnecessary proof that the Relevancy is before-hand determined. And if the point of law is doubtful, then an act before answer thereto is allowed, in order to prove the facts alledged by either party; and after the same is brought, the court advise the whole cause together. And thus issue in effect is joined, both as to Law and Fact, which, by the course of procedure in England, regularly is not admitted.

rer before the courts in England.

T I T. XXVI.

Proof, or Evidence in general.

HAVING thus described the nature of Actions, and the several kinds of them, and procedure therein, till there be occasion for taking a proof; without which, generally, the pursuer cannot prevail to have a decree in his favour, I proceed to it. Proof or Evidence is The means whereby the truth of any thing is made out, and, in this case, is "The legal means of convincing the judges that the pursuer's claim, or defender's plea is founded in fact." It is of the greatest importance in all law proceedings, since *Ex facto jus oritur*, The decision of the law must arise from the fact; and often it happens, that *Non jus, sed probatio deficit*, the party may have right on his side, but lose it for want of a competent proof.

1. The importance of proof.

^a Cicero, lib. 2. ad Heren. vers. princ.

^b Quintil. instit. orator. lib. 5. c. 1.

A VERY antient division of proof, and celebrated among the Orators of old, is That whereby it is either Artificial or Inartificial. The first is That which arises from the Intrinsic circumstances of the parties, and cause; in managing which, according to the great Roman orator, the pleader may display his greatest abilities; such causes by him are called *Causæ conjecturales*^a. It consists of the several particulars whence presumptions arise in favour of the party founding upon them, of which I shall treat afterwards in a distinct title. Inartificial proof is that which is made out by Extrinsic evidence, viz. either by Writings, Testimonies of witnesses, or Oath of the party, which were the means of proof generally used among the Romans, and on the issue of these depend most of the questions in law, as the great teacher of oratory in the latter age justly observes^b. And indeed the circumstances whereon the artificial proof is founded, generally terminate upon this kind of proof; for there must be evidence brought of the same. Of all those I shall treat in particular titles.

2. Proof is either artificial or inartificial.

ANOTHER distinction of proof is into Ordinary, the several kinds of which I just mentioned, so called, because it is in most cases used; and Extraordinary, which occurs in few cases. To this last kind of probation Presumptions may be referred. And Notoriety may be likewise accounted such; for some things are taken to be true, as notoriously known: thus, that the party is husband or wife, parent or child to such person, requires no other proof. This holds, where the parties live here; but, as to strangers, there must be some evidence of the relation brought. There are divers other particulars of

3. It is either ordinary or extraordinary; instances of both.

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the like kind, which are taken as sufficiently proved by notoriety. The proof by verdict of an inquest may justly be reckoned among the extraordinary proofs, since it was unknown among the Romans, and is but rarely used with us in civil cases.

4. Proof ex
evidentia fac-
ti, or evi-
dence upon
view, an ex-
traordinary
proof.

To this extraordinary proof may be referred That which the doctors call *Evidentia facti*, the Evidence of the fact itself, or upon View of the object or subject in dispute; as where a question occurs before a court or inquest, concerning the Idiocy of a party, his being sifted before them, and his judgment examined into, by putting questions to him; as he answers them he may be found an idiot or not, without any farther proof. Thus likewise, by the law of England, where one is found by office an idiot, he may be sifted in person before the lord chancellor, and examined by him as to his understanding, and as he is found by the chancellor idiot or no idiot, it shall stand ^a. And in many other cases view of the object or subject in dispute obtains, as touching the age of persons, the marches of lands, and more especially where a Coroner inquires of murder, upon view of the body ^b. In all those cases the evidence of fact upon view is the mean of proof, and a most convincing one it is, and sometimes prevails over a proof which otherwise is the most pregnant, viz. the verdict of a jury, as above. And to give another example in our law; an inquest serves one heir to a person supposed to have died abroad, he returns, and the service flies off. But it is to be adverted, that this evidence of fact does not concern the judge's private knowledge of the same; for tho' he had been present and saw it done, yet he cannot give his judgment upon such evidence, but must govern himself by legal proof, as I have taken notice elsewhere ^c. So that it must be a Notorious fact, which may be subjected to the view of any person, as in the instances above mentioned.

^a Vin. (lunatic) 139.

^b Coke 4. inltit. 271.

^c Sup. tit. 2. § 35.

5. Proof either full or insufficient, plena, aut minus plena; the effect of common fame.

THE probation of a fact may be either Full, called by the Doctors *Plena probatio*, or *Minus plena*, sometimes termed *Semi-plena probatio*, viz. Where there is some proof, but not full. In this case the judge is left at uncertainty, thro' insufficiency of the proof; and, in criminal matters, the party ought to be Acquitted, tho', in other countries, it may make way for putting him to the Torture ^d, but which is justly rejected in our law. In civil cases, an oath in Supplement may be ordered by the judge to be taken by the party who has so proved, in order to a complete proof, as shall be shown in discoursing upon the proof by Oath. It may be here questioned, how far common report, or *Fama publica*, is to be regarded as *Semi-plena probatio*? But I conceive, that tho', with other circumstances, it may have some weight ^e, yet by itself it ought to have none, as being as often false as true. Indeed, in one particular case, our law respects common fame: thus, in the trial of those notorious thieves, which of old passed under the denomination of Egyptians, as blackening their faces, it is declared sufficient to condemn them to the pain of death, That they were called, known, and reputed Egyptians ^f; but without some acts of violence or oppression, such sentence could not be given; and which cannot be drawn into example in other cases.

^d Voet. ad tit. de prob. § 3.

^e L. 3. § 3. ff. de testibus.

^f P. 1606. c. 13.

^aL. 1. l. 4. ff.
de req. rcis,
&c.

^bCoke 5. rep.
111.

^cL. 3. § 3. ff.
de testibus.

It may likewise be inquired, How far the party's flight, who is suspected to have committed the crime, can infer guilt against him? And indeed, by the civil law, If one cited, in a criminal accusation, did not sist himself within year and day, he forfeited his goods to the fisk ^a. After which example, by the law of England, If any one be appealed, or indicted of murther, and absents himself, till an Exigent is awarded against him; by such retreat, which is a flying in law, he forfeits all his goods and chattels which he had at the time of the exigent awarded, tho' he should render himself upon the exigent, and be found not guilty; unless the award of the exigent be afterwards reversed, upon a writ of error ^b. Thus likewise, If one indicted of a crime, with us, is denounced fugitive, thro' his non-appearance at the diet prefixed to stand trial, he forfeits his moveables; and, tho' he should afterwards surrender himself, and be acquitted of the crime, yet the escheat of his moveables still continues; unless he is reponed against the same in due course of law. And, to the above effect, flight, in all these laws, is holden as an argument of guilt.

6. The flight of a party, how an argument of guilt. This illustrated from the civil law, the law of England, and our own.

EVIDENCE is multifarious, and what degree of it shall be sufficient, cannot be defined by any rule of law; for it must be adapted to the cases respectively that come in question before the judges, or if the trial is by a jury, before them. And such evidence, whether a direct proof, or a presumptive one, (which I may call a Probable Evidence) as convinces the conscience of the judges, is sufficient. This is beautifully set forth by the Emp. Adrian in his rescript to a judge ^c. *Quæ argumenta ad quem modum probandæ cuique rei sufficient nullo certo modo satis definiri potest;* (and after mentioning several kinds of proof, he thus proceeds) *Hoc ergo solum tibi rescribere possum, summatim, non utique ad unam probationis speciem cognitionem statim alligari debere, sed ex sententia animi tui te æstimare oportet, quid aut credis, aut parum probatum tibi opinaris, i. e.* That no certain rule can be given, as to what kind or degree of evidence is necessary in every case that may occur, that therefore the judge should not restrict himself to any one kind of it; but, according to the nature and circumstances of the case, to consider in his conscience what is sufficiently proved to the conviction of his own mind, or what is defective in that respect, and to give judgment accordingly. An advice which all judges and juries ought to follow, as the variety of cases admits of a different consideration, as to the proof requisite to find out the truth of the same.

7. The degree of evidence, requisite in any particular case, depends on the nature and circumstances of it.

FACTS are the only subject of proof; and regularly the pursuer ought to prove his libel or claim, and the defender his plea. And, in fine, it is incumbent upon each party to prove his own allegations; which leads me to consider the several kinds of Ordinary or Inartificial proof.

8. Facts only the subject of proof, and must be proved by the party who founds on them.

T I T. XXVII.

Proof by Writing.

AFTER acts are awarded for leading Probation, no farther procedure can ensue, till it is brought, or the party, burthened with it, barred by a Circumduction of the term, (as we call it) for not

1. In acts, warrant granted to cite havers of writings, not

and witnesses, in order to a proof; ordinary probation in civil cases, writings, witnesses, and oath of party. The import of a proof *prout de jure*.

not leading the same; and, therefore, what falls next to be considered is such Proof. In acts, whether of Litiscontestation, or Before answer, Diligence, *i. e.* warrant from the court, is granted to the respective parties for recovering writings, or citing witnesses, to be used in the proof of the allegations admitted to be proved, or for taking the party's oath on points referred thereto. The manner of proof is always determined in the act. Ordinary probation or Evidence is therefore threefold, either by Writings, Witnesses, or Oath of party, as above related. If the points are found relevant to be proved by all of these ways, it is said to be a proof *Prout de jure*, which comprehends not only evidence by the testimonies of witnesses, but likewise writings and oath of party, tho' it is commonly understood, where the point is capable of proof by witnesses; for this is the stile in civil cases, where proof by witnesses may be admitted. And it is termed a Proof, *Prout de jure*, by an implied reference, as I suppose, to the civil law, because thereby witnesses are a competent mean of proof, almost in all cases, which they are not so amply by our law. The evidence by writings shall be considered in the first place.

2. Probative writings are either public or private; public, as the acts of court, &c. How far do minutes of proceedings in courts prove. Is an advocate's admitting matters of fact good against the client.

PROBATIVE writings are either public or private. Public, are the Records of courts, and Extracts of clerks of courts of the proceedings therein. These will prove what was done by the judges, or alledged by the parties, but will not prove the verity of their allegations, without the instructions of them. Nor will the judicial Minute of the clerk before an inferior court, bearing a party's confession, be effectual against him, unless it is either subscribed by him, or, if he cannot write, by the judge for him. But an advocate's acknowledging a fact, in a pleading before the court of session, will militate against the client, unless recently challenged. The warrants of the extract are presumed to be in the record. Judicial writings, as enactment by a party or his cautioner in the court-books, or judicially made, are good, without the ordinary solemnities of other deeds, and may come under the notion of Public Writings; but unless the parties subscribe them they are not probative ^a.

^a Feb. 13.
1663. town
of Lithgow.

3. Instruments of notaries either solemn or not solemn: the first, such as are necessary to complete rights or diligences; some of these specified.

INSTRUMENTS of Notaries, in relation to things whereupon the instruments are taken, prove, in some cases, the solemnities and facts therein contained. These are either solemn or not solemn: Solemn, when they are necessary requisites to complete a right or diligence, as instruments of feisin and resignation, instruments of requisition, premonition and consignation, intimations of assignations, protests of bills of exchange, and others. Those are fully probative of the solemnities and facts therein related, without being ascribed or strengthened by the oaths of the instrumentary witnesses, unless they are offered to be improven as false ^b.

^b Fount. June
30. 1680.
Ruthven.

4. Where writing is an essential solemnity, it cannot be supplied by the party's oath.

WHEN writing is an essential solemnity, it cannot be supplied, even by the party's oath. Thus legal acts, as charges of horning, poindings, arrestments, &c. or necessary acts perfective of the right, as feisins, &c. cannot be proved by the party's oath; for these acts must not only be truly done, but likewise executed in writing ^c.

^c June 5. 1714.
Hafwell.
Dirlet. decis.
132.

INSTRUMENTS not solemn, are such as parties take in the hands of notaries, upon offer of the performance of things incumbent on them, or against those who refuse implement, or upon any other extrajudicial facts or deeds. The instrument itself, in such case, is probative that it was taken; but, as to what was said or done by the parties, it must be evidenced by the oaths of the witnesses to the instrument. I have spoken elsewhere at large of instruments of notaries ^a.

^a Sup. tit. 5.

PRIVATE writings are Those subscribed by the parties or notaries for them, when they cannot write; concerning which I have discoursed fully in the proper place ^b. Unsubscribed writings regularly make no faith, only Count-books prove against the party that uses them, especially if they are wrote with the party's own hand, even tho' they are not merchants ^c. In favour of commerce, count-books regularly kept by merchants of good fame are probative, even in their favour, being ascribed or adminiculated by the oath of the merchant or book-keeper, or without it if he is dead ^d. Here the parties who transact business with merchants, without entering into writing, tacitly depend on their faithfulness in posting accounts into their books. But credit is only given to them in matters of buying and selling between the parties themselves, or otherwise relating to their business, but regularly not against third persons. Thus, one's being mentioned in those books to have become cautioner for the buyer, will not be good to fix an obligation upon him. Merchants accounts prescribe in three years after the last article, and consequently faith cannot be given to their books in their favour thereafter. A merchant's book, regularly kept, is sometimes good, even in questions where third parties are concerned. Thus, a bond due to the merchant, being marked in his book as paid, was sustained as a legal evidence of it, in competition with a posterior assignee thereto ^e. But this was admitted, because an assignee is liable to all the exceptions competent against the cedent, and so cannot be a rule in other cases.

^b B. I. tit. 11.
§ 23, &c.

^c Decem. 17.
1675. Lawrie. June 7.
1677. Purveyance.
^d Gosford.
June 5. 1672.
Wood.

^e July 19.
1662. Jan. 8.
1663. Skeen.
Harcus (discharges)
March 1683.
Currier.

^f Dalr. Dec. 8.
1703. Allan.

^g Bruce MSS.
July 22.
1716. Hume.

^h June 10.
1748. Cunningham.

ⁱ Hume (app. and reprob.)
Jan. 26.
1731. Fca.

ONE cannot found on a writing, as the title of his action, without approbation of the whole writing, for thereby he uses it as his own; but he may appeal to a writing for a proof of a particular therein contained, without approving of any more of its contents. So that, in the first case, one cannot Approbate and Reprobate, for it would imply a contradiction ^f; but in the second he may, without any impropriety, for he uses the writing only as a proof of a particular fact, but does not acknowledge the writing as good against himself ^g. Thus an heir may insist on a clause in a death-bed deed, revoking a former disposition, and at the same time reduce the deed, as granted on death-bed ^h; and, if a party was under a prior obligation, and pursuant thereto had granted a disposition, one interested in the subject may found upon such deed, and at the same time impugn it, so far as disconform to the obligation ⁱ.

THE faith of writings may either be altogether Enervated, or Diminished only. Writings may be set aside divers ways. Thus they are Improbative, if the subscriptions of the witnesses and parties appear manifestly to be all one hand-writing, and will be rejected as

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copies,

5. Instruments not solemn, are those taken in the hands of notaries, upon extrajudicial facts and words.

6. Private writings; regularly only subscribed writings prove; but in favour of commerce, merchants count-books probative in some matters; to what effect does this hold.

7. Can one found on a writing without approving it wholly.

8. The faith of writings may either be altogether enervated or diminished

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only; instances of the first.

copies, or as forged, even without proponing improbation. As likewise, for the same reason, faith will be denied to writings vitiated in the substantials by Deletion, Razure or Superinduction, such not being authentic. The Substantials are, the sum, or other subject of the deed, the creditor or debtor's name, the names and designations of the witnesses and writer, and their subscriptions. Thus, if the writer, or any of the witnesses is insert by a wrong Christian name, it annuls the deed, for in such case the true person is not insert^a. A Date is material, and one of the substantials, where it tends to support or invalidate the deed; and, if a deed is deceitfully falsified in the date, in order to make it prior to an Inhibition, or from the like fraudulent design, it will be totally annulled^b. In the same manner, when the sum is vitiated, as from merks to pounds, it will be intirely voided^c. All vitiations or mistakes in the body may be remedied before completing the deed, by adding in the writing itself, That they were made, or Rectifying them before signing. But otherwise it is doubted, if the objection can be removed, by the instrumentary witnesses deposing, That the alterations were made by consent of parties before signing; but certainly it may by oath of the defender.

^a July 15.
1707. Aber-
cromby.

^b March 29.
1626. Keith.
Feb. 10.
1636. Ed-
monston.
^c Hume(writ)
Nov. 26.
1732. Mac-
Doual.

9. The faith of writings quite destroyed, by their being improven.

AGAIN, the faith of writings is quite destroyed, by their being actually Improven either in way of action or exception, for they are then declared false and forged. Or, if Certification goes out, when the allegation of falsehood is proponed against them, they are holden as false in every respect, as if they had been directly improven upon a proof of the falsehood; till such decree is reversed or reduced, which will be difficult. I have treated largely upon the falsehood of writings elsewhere^d, and shall immediately discourse farther of Improbation of the same.

^d B. 1. tit. 10.
sect. 15.

10. How far writings may be taken away by witnesses, or redargued by such proof.

IT is a question of no small importance, How far writings, in other cases than that of improbation, can be redargued by witnesses? I apprehend, the rule may be laid down, That where a deed is brought under challenge, as illegally granted, viz. extorted by force, or impetrated by fraud, or the like, in order to invalidate the same; the facts whereupon these allegations are founded may be proved by witnesses, from the nature of the thing^e. But, if the deed is owned to be valid, the testimony of witnesses cannot be used to extinguish it, or redargue the contents or tenor of the same, the maxim then being, That writing cannot be taken away by witnesses. Indeed, where the onerous cause of a bond is a bargain of moveables, or the like; or tho' it bear borrowed money, yet, if the true cause is proved, by the creditor's oath, to have been such, his failure in the performance or conditions of the bargain; or where it is a bond for work to be done, or delivery of goods; performance may, in order to qualify or set aside the bond, be proved by witnesses^f. But That does not impugn the foresaid maxim; for in such cases the witnesses do not redargue the bond, but it is the onerous cause, either mentioned in the deed, or acknowledged by the creditor, that makes way for admitting witnesses as to facts, to the proving of which they are competent.

^e Feb. 15.
1679. Cath-
cart. Dirl.
decif. 423.
432.

^f July 26.
1622. David-
son. June 15.
1665. Aitk-
man. Jan. 22.
1674. Sim.

11. The faith of writings, how diminished.

THE credit of writings is Diminished various ways, from the circumstances that lay them open to suspicion, either arising from the condition

condition of the party who grants them, as being a weak person, or perhaps in drink at the time, or the like, or from the method of obtaining them, as if threats were used. It were endless to enumerate all the circumstances attending deeds, that may weaken the faith of them, and yet not be sufficient to overturn them; unless other particulars occur that may have such effect when conjoined.

ONE's subscribing witness to a deed does not regularly infer his consent to the contents, for he only attests the party's subscription, which he may do without knowing any thing of the nature of the writing; but, if he is presumed to have been a communer, as where near relations subscribe witnesses to a contract of marriage, the case is otherwise ^a.

^aFount. Jan.
13. 1704.
Dallas. Edg.
July 7. 1725.
Johnston.

^bL. 26. § 1. ff.
de pign. et
hyp.

IF one writes an obligation granted by another person, who duly signs it, and in such writing a subject belonging to the writer of it is made over to the creditor, for security of the debt, the question is, If the writer is thereby liable to make it good, tho' he does not sign the deed? The case is precisely put in the civil law, and the decision is, That the writer is bound ^b; and the reason assigned is, *Cum sua manu id scripserat, consensum ei obligatione cum dedisse manifestum est*; because 'tis plain, that, by writing the deed, he assents to the obligations therein contained. I doubt not but the same would hold with us; since the writer manifestly consents to the granter of the obligation, his subjecting the land belonging to him the writer, to the creditor, for security of his debt.

How far, in the just mentioned case, seisin taken in the lands of the writer, would prefer the creditor to another, who should thereafter obtain from the writer himself an infeftment on the same lands, may justly be doubted. I conceive, that since there is no explicit deed from the writer of the first obligation, creating a real right upon the lands, his consent given, in the above manner, would only bind him and his heirs personally to make good the security, by granting a formal right upon the lands. But our records being the rule, by which creditors and purchasers of lands are to be directed, since nothing appears from them, touching the first security, as to its burthening the lands, by a warrant from the heritor to take seisin thereon, the second infeftment behoved to be preferred.

MARGINAL notes are not good, unless subscribed by the parties before the witnesses, and that the writing bear so. In contracts, if the marginal note is on the one side thus duly signed, and not on the other, it is good against both, since it is the evidence of both, and would have full effect, tho' the other side were not extant; nor is it material in which of the parties hands the same is found, or in whose favour the marginal note is conceived. Large blanks, in a material part, filled up with another hand, may render the writing impro-
bative, unless adminiculated.

ONE may, on a diligence, oblige all persons to exhibit writings necessary to prove his libel or defence, even the adverse party himself; but he is not obliged to exhibit any other writings than those specially

12. When does one's subscribing witness infer his consent to the contents of the deed.

13. One writing an obligation granted by another, will subject him to make it good, as to what concerns himself therein.

14. Another getting a formal infeftment in the lands, will be preferable to the first creditor.

15. Marginal notes not good, unless signed. The case of large blanks filled up with another hand.

16. Either party may, on a diligence, oblige strangers to pro-

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duce all writings of use to prove their respective allegations. How far the adverse party bound to produce writings against himself.

specially condescended on (particularized). For if it were otherwise, one may be forced thus to lay open his charter-chest, and thereby furnish his adversary, or third persons, with grounds of claim against him, which were a great hardship. And in this sense we understand the maxim, *Nemo tenetur edere instrumenta contra se, viz.* That none is bound, at the suit of his adversary, to exhibit writings against himself: and the same is the case of his agents, advocates or trustees, for the same reason^a. The maxim is derived from the civil law, where it was general, but we limit it in the above manner.

^a June 26. 1735. Scot contra lord Napier, affirmed on appeal. ^bB. I. tit. 11.

17. A general right of all one's effects, implies the burthen of his debts to the extent.

I HAVE spoken elsewhere of the interpretation of writings^b; and shall only add, That a general gratuitous right of all one's effects, is understood to be with the burthen of his debts, tho' not express, at least to the extent of the subject, *Bona cujusque intelliguntur quæ deducto ære alieno supersint*^c; one's means is understood only of what remains after deducting his debts.

^cL. 88. 125. ff. de verb. signif.

Observations on the Law of England, in relation to the Premises.

1. Evidence comprehends testimonies of witnesses and writings.

EVIDENCE, in the usage of the law of England, comprehends the Testimony of witnesses and Writings, as likewise matters of Record, as letters patent, fines, recoveries, and the like, as also writings under seal, and these are said to Prove themselves, and to admit of no argument to the contrary. Parish-books, and registers of births and marriages, are also good evidence to prove the same^a.

^aCoke 1. infl. 283. Bac. new abr. (evidence) 306.

2. The authority of shop-books.

TRADESMENS shop-books, by an express statute in England, shall not be received in evidence for wares or work above one year, before the action brought^b. But this act does not concern intercourse of traffick, trading, or dealing for wares delivered between merchant and merchant, and merchant and tradesman, or tradesman and tradesman^c.

^b7 Ja. I. c. 12.

^cBac. ibid. 307.

3. No parol evidence can be admitted to controul what appears on the face of a deed or will.

IT is a general rule in the law of England, That no Parol evidence can be admitted to controul what appears on the face of a deed or will; not only from the danger of perjury, but likewise from a presumption, that whatever the parties had at the time in contemplation, was all reduced into writing. And even in the courts of equity, in the interpretation of wills, this rule must be observed; for the testator's intent must be collected from the words of the will, and not from any foreign matters; and, if it were otherwise, property would be rendered precarious. Hence, in a late case in the house of peers, such parol evidence was rejected in the construction of a will^d.

^dBac. new abr. (evidence) 310. Selvin and Brown. March 21, 1734. ^eVin. tit. (facts or deeds) p. 37, &c.

4. Rasure of the deed, after it is executed, vitiates it; the case of interlining.

RAZURE of the deed, after it is executed, in a place material, as of the name of the granter, grantee, thing granted, or sum said to be paid, vitiates it: any interlining in a deed will be presumed to have been at the making of the deed, and not after^e. Our law agrees in the main with the above principles, as to the rasure of deeds; but interlinings will be rejected, as a marginal note not signed.

5. The case of a defendant pleading Non

WHEN one is sued in the courts of England on a bond which he alledges to be false, he must deny it to be his deed, and plead, *Non est*

est factum; but if, upon issue joined, it is found against him by the verdict, he shall be fined for his falsity, and the trouble he gives to the jury; and tho' he be a peer, an attachment shall go against him for the fine due to the king^a.

est factum, or denying the subscription or seal to the bond sued on.

^a Coke 1. inst. 283. 5 rep. 119. Whelpdale's case, Vin. (amercia-ment) 450.

^b Mod. cases, 6. part 217. Buller v. Passmore.

^c B. 1. tit. 10. sect. 15.

THERE is therefore this considerable diversity between the law of England and Scotland, as to the faith of writings, That, by their law, if the defendant, against whom a bond or obligation is produced to found an action, plead *Non est factum*. Generally, he turns the proof, of whatever is necessary to make it his deed, upon the plaintiff^b. Whereas, by our law, the reverse holds, for the defender must prove that the deed is not his by proponing improbation against it, *i. e.* al- ledging That it is a false deed, and proving it to be so, by the instru- mentary witnesses, or otherwise by circumstances and presumptions, as I have partly shown elsewhere^c, and shall further set forth in the next title.

6. The diver- sity between the law of England and Scotland, as to the faith of writings.

BUT deeds of Bargain and Sale enrolled may be given in evidence, without any proof made of the bargainor's sealing and delivery; and enrolments of deeds on the statute, *viz.* Statutes-merchant and Staple, are likewise given in evidence, without witnesses of the seal- ing and delivery of the same; for the party's acknowledgment of the deed, in a court of record, is good evidence of its being sealed and delivered, and it is That which gives it credit, and not its ope- ration or contents; and therefore such acknowledgment estops him from pleading *Non est factum*^d.

7. The plea *Non est fac- tum*, not good against deeds ac- knowledged in a court of record.

^d 1. Salk. rep. 31.

T I T. XXVIII.

Reduction and Improbation of Writings.

AS the faith of writings is quite destroyed by Reduction of the same, so that thereafter they cannot be given in evidence, I shall discourse here of the action whereby this is accomplished, which is either a Simple Reduction, or with an Improbation conjoin- ed. In a Simple Reduction, where the writings called for are not produced, decree of Certification is granted against them, That they shall be held as reduced, ay and while they be produced: this being a decree, stands good until it be set aside; and the obtainer of it is safe as to intromissions by virtue of the same, and is only liable from the time that, in a reduction of the decree of certification, the writ- ings are produced, and the same found preferable to the possessor's titles; for he was not *in mala fide* before. But the writings, against which certification is granted, may be produced by the party inte- rested, to defend in any suit at the obtainer's instance against him; and when the certification is obtruded, a reduction thereof may be repeated *incidenter*; so that the certification is of no great import- ance. But if the writings called for are produced, and reduced upon litigation, it has the same effect as any other decree *in foro*.

1. Reductions imply a de- clarator of the pursuer's right, and fre- quently con- tain it. The effect of a certification in a simple reduction.

A REDUCTION and Improbation is a most effectual action, and of much greater force than a simple reduction. It concludes that
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2. Reduction and impro- bation; can

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it proceed against an heir within the year of deliberation. The effect of a certification in it against writings not produced. The import of the king's advocate's concurrence.

the writings called for are False and Forged. It is absolutely necessary that Falsehood be libelled as a reason of reduction; for otherwise a certification for not production, will have no more effect than as in a simple reduction^a. If the defender appear, and take terms to produce the writings called for, two terms will be allowed him; and, after elapsing of both, judicial intimation must be made to the defender's procurators, to satisfy the production within 10 days^b. This circumspection is used, because of the signal consequences of a certification in such case; but if the writings are not produced in that time, certification will be granted against them. This action is not competent against the heir within the year of Deliberation; because, tho' it requires no previous charge to enter heir, yet the heir cannot defend himself without using and producing the predecessor's rights, which would infer Behaviour as heir against him^c. The effect of a certification in this action is, That the writings are holden as actually forged. But it operates only in favour of the obtainer, and with respect to the rights which he founded on in the suit as his title. As to all other persons, or other rights in the pursuer's own person, the writings are still probative^d. It may be laid down as a rule, That one cannot insist for a certification against other writings than such as are said to be granted by himself, or his predecessors or authors, to whom he connects a progress. The case is the same as to decrees called for. And a pursuer, in order to force production of rights, whereupon infestment hath followed, regularly must be infest in the subject^e. Indeed, an adjudication against one, as charged to enter heir, may found a sufficient title to call for all infestments granted by the predecessors, whose rights the pursuer produces, but not as to those proceeding from their authors, unless he was infest^f. A certification, given upon the general clause, ordinary in improbations Calling for all writings, decrees, &c. for not production of the same, can have no effect but as to writings in the above situation^g. The reason is, because one, in order to set aside writings, must have an equal interest with that which he insists to have removed; and, if it were otherwise, people might be obliged to lay open their charter-chests at random, to their great prejudice. This action must be with Concurrence of the king's advocate, in respect of the falsehood libelled against the writings, and which is given of course, and cannot be refused upon payment of the customary dues. But such concurrence being given to satisfy form only, the lord advocate may appear in that very action, and plead in his majesty's behalf^h. If the defender has not the writings in his possession, he will get incident diligence against Havers, during the course of the terms for production, or even after they are run, before certification is extracted, because of the great effect of such certification. If the defender wants to call his authors, in order to fix them by the warrantice, in case the rights shall be reduced, he may do it by an incident likewise.

3. The defender needs only produce writings sufficient to exclude the pursuer's interest; what if

THE defender needs not produce farther than such writings as are sufficient to Exclude the pursuer's interest, founded on as his title; but he can only plead this defence upon the first production, and if he is over-ruled, he must thereafter make a full productionⁱ. It is sufficient to condescend on (specify) the dates of the registration of writings, recorded in the general register, in cases where the principals

^a June 23. 1680. Earl of Queensberry. Fount. Jan. 19. 1694. Hill. Hope, (improbation) Jan. 15. 1624. Hamilton.

^b Act of sed. Jan. 1. 1709.

^c June 26. 1667. Dewar. Fount. Dec. 4. 1702. Pitcairn.

^d Feb. 13. 1627. Borthwick.

^e Feb. 4. 1631. Glenbervy. July 24. 1673. Shaw. Fount. 23. June 1680. Arbuthnot. Decem. 16. 1709. Farquharson.

^f Hume (improbation) 445. Jan. 24. 1739. Keith. ^g Jan. 31. 1677. Garden. Fount. Jan. 19. 1698. king's advocate.

^h Act of sed. Jan. 31. 1633.

ⁱ Decem. 7. 1667. Earl of Lauderdale. Fount. Feb. 7. 1696. Bain.

*Fount. Dec.
28. 1704.
Wilson.

pals are left, and presumed to be lying. And if the pursuer wants to insist on the reason of falsehood, he may get a warrant for producing them; but if, after search made in the record by the pursuer, the keeper certifies the writings are not there, certification will be granted against them^a. If the pursuer restrict himself to other reasons of reduction than that of falsehood, the defender is bound to produce extracts, but otherwise the condescence is sufficient. The pursuer may insist on the libelled reasons of reduction, or other competent grounds of law. Here litiscontestation can only be properly made upon the reasons of reduction insisted in; and therefore a decree of reduction is only a *Res judicata* as to these reasons, and the pursuer may, after decree-absolvitor from that action, insist in a new suit, upon any reason of reduction not formerly over-ruled.

the writings called for are not found in the general register, where said to be registred. If the pursuer pass from falsehood, the defender bound to produce extracts.

^b B. I. tit. 10.
§ 221, 230.

I HAVE observed elsewhere^b, That inferior judges are competent to falsehood, when proponed by way of exception or reply, against any writings used in actions before them; and I shall only add, That in no case the judgment of an inferior court, finding a deed forged, can be sufficient for remitting the party to the justiciary, in order to a criminal prosecution; for it is only a decree of the court of session Improving the writings, and their Remit thereon, of the offender to the justiciary, that can have such effect.

4. The effect of the judgment of an inferior court, in the case of falsehood.

It is a maxim, that *Nunquam concluditur in falso*; the meaning of which seems to be, That when falsehood is prosecuted, either by way of complaint, or in an action of improbation, or even when it is insisted in by way of exception or reply, there is no formal Conclusion as to the proof, but all evidence may be brought, either to make out the falsehood of the writings, or for clearing the party charged with it, till decree is extracted; so that a circumduction of the term, against the party who undertook a proof, will not conclude him, or bar his proceeding still to have new matters of fact that emerge proved. This maxim chiefly concerns the case where writings are endeavoured to be improved in the indirect manner, in which variety of circumstances may occur, tending either to the defender's condemnation or exculpation. The maxim is mostly applied to the party who insists to improve the writing; but, to be sure, a defender, in such question, cannot be bound to remain forever under so heavy a charge; and therefore, after a reasonable time for the prosecutor to conclude his proof, the court will give final judgment in the cause, which being extracted, will conclude both parties.

5. The import of the maxim, *Nunquam concluditur in falso*.

THE acts in simple reductions, or reduction and improbation for production, are only preparatory to the discussing of the reasons, and the pursuer may insist in which he pleases; and it is said to be a rule, That Competent and Omitted can never take place against a pursuer. But I cannot see any good reason why a defender may not oblige the pursuer to insist in the reasons of reduction libelled, or that he may be absolved therefrom, since they are once brought in judgment, and the maxim just referred to cannot exclude him from that benefit. The reasons of reduction are as many as there are grounds of law for reducing rights, of which I have spoken in the proper places.

6. How far the pursuer may be obliged to insist in his libelled reasons of reduction; or that the defender may be absolved therefrom.

7. Abiding by the deed, how far it may be qualified.

THE user of the deed, against which improbation is offered, regularly must Abide by the verity of it, *Sub periculo falsi, i. e.* That he shall undergo the pain of falsehood if it is improven. I have taken notice elsewhere^a, How far a qualified abiding by, *viz.* That he came fairly by the deed, in such a way as he specifies, may be admitted; to which I shall only add, That it is a most arbitrary question, and sometimes the court admit it, and at other times refuse the same, and only allow the party to Protest in terms of the quality, as appears from the various cases upon that head^b. The difference between the two seems to be, That a simple abiding by continues the party under apprehension of the fatal consequences, in case the deed be improven, and he do not prove the allegations in his protest; from which the admitting it qualified relieves him, he being then in no danger from using the deed, and abiding by the verity of it, unless his own accession to fabricating the same be proved. However, the rule laid down in the above-quoted place generally holds, *viz.* That the user must Simply abide by the deed, unless he produce another to do it; as the cedent, where the assignee is the user of the bond challenged; and the messenger or notary, in the case of executions or instruments, offered to be improven.

^aB.1. tit. 10.
§ 114. 124.

^b Hume (improbation)
P. 454, &c.

8. How far the using false deeds infers the same pain with the fabricating them.

THE fraudulent using false writings subjects the party to the pain of death, in the same manner as the falsifier, by the laws of other countries as well as with us; but then the user, without any accession to the forgery, has liberty, by their laws, to retract, and to bind himself that he shall never use them thereafter; in which case he is subjected to the costs of suit, and the writings are only declared Improbative^c. After the same example with us, if the user do not sign an abiding by the writings, they are only cut off by the certification against them; and he who used them is safe, farther than as to the expence of the other party, unless he was the actual fabricator, or accessory to the forgery.

^c Fab.cod.
lib. 9. tit. 13.
def. 10.

9. Examination of the party charged with falsehood.

THERE is a particular in the improbation of writings as false, before the court of session, worth observing; they examine the party upon the deed under challenge, as to the circumstances relating to the same, which they do in the first place. This does not obtain in a criminal prosecution before the court of justiciary; but it is necessary in the above case, in order the more easily to bring to light such works of darkness. Nor has the defender ground to complain; for if it is a true deed, such examination may turn to his advantage, by putting the same in its proper light; and if it is false, all means ought to be competent in order to his conviction. I apprehend this course was one reason for the usage of bringing causes of falsehood, in the first instance, before the court of session.

10. The party said to have signed the deed, not admitted a witness in the improving it.

IT is most certain, that a party who sues an improbation of a writing, said to be granted by him, or in any other form propones improbation against a deed, importing a debt or charge upon him, cannot be admitted a witness in order to improve it as false; for that were to be a witness directly for himself, or in his own cause. And tho' the same is offered to be improven by way of complaint, at the instance only of his majesty's advocate, the party cannot be produced as a witness

TIT. XXIX. Proving the Tenor of Writings. 641

^a July 16.
1751. king's
advocate a-
gainst Herds.

^b B. 1. tit. 10.
sect. 15.

witness for the pursuer^a; for, tho' it be at the suit of the public, yet the private party has the same interest in the cause, as if it were at his own instance; since, if the writing is improven, he is freed of the debt or claim which otherwise might stand good against him. I have discoursed more at large, in another place, upon the improbation of writings^b, to which I shall only add the following case.

^c Nov. 7.
1751. Ropp.
of Leith a-
gainst For-
rester.

^d Id. 12 ditto.

A GENTLEMAN, straitened in his credit, fabricated several bills, and indorsed them to his creditor, who was urgent for payment; and the matter coming to be discovered, a complaint was exhibited against him for forgery. The issue was, that the bills appeared all (except one) to have been drawn upon fictitious persons; for none such were to be found. As to the one which was upon a real person, to whom the designation, in the direction of the bill, perfectly agreed, the defender, to avoid the charge of forgery, pretended, That it was on another of the same name that accepted the bill, but he could not ascertain him. As to the bills on the fictitious persons, it could not be forgery, which is only Where one's subscription is forged, in order to subject him to a false deed, which was not the case here; but sure, the indorsing even those bills was a great cheat. The lords Found the bill drawn upon the real person forged, and the rest false and feigned^c, and inflicted an arbitrary punishment upon him, viz. they Declared him infamous, ordained him to be set on the pillory, and to be banished into the plantations for life, with certification, That if he returned to this country, he should incur severe punishment, (needless to be here mentioned) and found him liable in 300 l. Sterling of damages and expences to the creditor^d. This may seem rigorous, but being a notorious roguery, and the first of the kind, it was necessary, as an example, to deter others from the like practices. And indeed, according to the strict rules, they might have remitted the defender to the court of justiciary, in order to a capital punishment, in respect to the bill to which the party's acceptance was forged.

11. The case of indorsing bills drawn upon fictitious persons.

T I T. XXIX.

Proving the Tenor of Writings.

^e June 17.
1712. Hume.
Fount. July
30. 1680.
Hume. Gosf.
Jan. 22.
1674. Cran-
ston.

SOMETIMES writings happen to be lost, or accidentally destroyed. Therefore, to supply that defect, and to renew and redintegrate the same, the wisdom of our law hath devised actions for proving the tenor of the same. Upon such emergencies, they are necessary remedies, because some writings are essential to the right, and others are indispensable means of proof. The lords of session sometimes dispense with the solemn manner of proving the tenor, and sustain it on a petition: for example, where a writing produced as the ground of action or defence before them has been defaced, or parcel of it worn or torn off, or the writing itself lost during the suit^e; but this summary procedure can only take place in the like favourable circumstances, and when recently applied for.

1. Actions of proving the tenor, they are founded in the civil law. In some favourable cases, the court allows the tenor to be made up summarily.

In this action the *Casus amissionis*, viz. the accident or occasion by which the writing was lost, and tenor of the writing, must always be libelled; and sometimes the libelling the *casus amissionis* is suffici-

2. In proving of tenors, must the *casus amissionis*

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be always
proved.

ent, without proving it, otherwise than by the pursuer's oath; and a general averment, That the writing is lost or destroyed, may be good. There is a difference in writings in this respect, for some writings are intended for perpetual evidences, as discharges, dispositions of lands, &c. And others, to be paid and retired, as bills or bonds of borrowed money. In those last, the *casus amissionis*, or occasion of the loss of the writings, must be specified and proved; but, in the other, it will be more easily admitted, and a general suggestion, That the writing is lost, will be sufficient; especially, if there are adminicles in writing relative to the deed that is lost. And, on the other hand, in favourable cases of that kind, such as a contract of marriage between persons of that rank that they are presumed not to marry without a contract; the tenor will be admitted, if the special *casus amissionis*, and tenor of the deed are fully proved, tho' there be no adminicles in writing^a; but, in such cases, the witnesses must be beyond all exception, and their testimonies pregnant.

^a June 9.
1674. Cunningham.
Jan. 2. 1680.
Lithgow.

3. Adminicles for proving the tenor; the different kinds of them.

ADMINICLES, in the general acceptation, are All circumstances that aid or help to make out the tenor of the writing, or to support the action. But, in a more limited sense, common in the language of our law, they are understood in a proving the tenor of adminicles in Writing. The most pregnant of which are collateral deeds in writing under the party's hand, relating to the deed in question, whereof the tenor is to be made up, which import, That he had granted it. Again, judicial proceedings in a court of record, where such deed is mentioned to have been produced, and the granter or his representative a party to the suit; or where documents had been taken upon the same as a feisin, or even an extract of the feisin, or copies of the deed attested by notaries, or deposed to by witnesses of credit, are good adminicles^b. The term (Adminicles) is used in the canon law in the same sense as with us^c, from which it probably was derived to us.

^b July 26.
1662. lady Milton.
Fount. Dec. 15. 1702.
Douglas.
^c Cap. 13. ext. de probat.

4. Proving of the tenor, in some measure, founded in the civil law.

THE action of proving the tenor is, I apprehend, peculiar to our law, as reviving a deed which had perished by accident. But it is in some measure founded in the civil law; for, by it, when a writing was accidentally lost, the party, in whose favour it was granted, upon proving the accident by which it perished, was allowed to give evidence of the contents by witnesses^d.

^d L. 18. in fin. c. de test. l. 10. c. de fide inst. nun.

5. The course followed, in our old law, to supply a proving of the tenor.

By our old law, when a deed was lost by accident, the case behoved to be tried by an inquest; and if they, by their verdict, found, That a deed of such tenor as the pursuer insisted for was really granted, and that there was sufficient evidence of the accident by which it was lost, such verdict was to stand in place of the deed^e; so that truly it was a decree of proving the tenor in a most effectual manner. And now a decree of the court of session, Finding the tenor proved, supplies the deed, in the same manner as such verdict formerly did, and the court of session is in place of a jury.

^e Quon. attach. c. 55.

6. If the substantial parts of a writing are proved, the ordinary

If there are adminicles in writing which prove the substantial parts of the deed, the tenor will be sustained without witnesses deposing thereon^f, and there needs no proof of the full tenor, the ordinary clauses being always presumed. But the tenor will not be sustained

^f Hare. (proving the tenor) Feb. 2. 1682. Lefmore. March 1685. Kinnier. Fount. June 26. 1712. Inglis.

tained with any extraordinary clauses, unless they appear from the adminicles, even tho' the witnesses deposed expressly upon them; for that were so far to make up the writing solely by their depositions. The witnesses, upon the tenor, ought regularly to depose as to the solemnities of the writings, that they either were witnesses themselves, duly infert and subscribing, or saw the writing containing the solemnities; or, if any relative writing, as a seisin, or extract of it, containing the solemnities of the writing that is lost, be produced, it may be sufficient. This would seem absolutely necessary; because the pursuer's intent may otherwise be to make up a writing as valid, which was null or defective, and the court of session found this to be the rule^a. But, if the writing has been produced in processes where the debtor was appearing, and not objecting to the formality of it, that will be dispensed with^b.

clauses will be presumed, but not extraordinary ones; however the solemnities, as the subscribing and attesting regularly must be proved.

^a July 17-1713. Blackwood. June 25. 1747. Campbell.

^b Fount. June 26. 1712. Inglis. Dalr. June 13. 1707. Trotter.

^c P. 1579.

c. 95.

^d D. P. 1579.

c. 75.

By an old statute^c, The tenor of letters of horning, and their executions, cannot be proved by witnesses; but that will not hinder the tenor of them to be proved, if there are adminicles in writing. By a preceeding statute^d of the same parliament, hornings, and executions of them, were ordained to be registred within 15 days after the denunciation; so that proving the tenor of them thereafter behoved to be much easier than before. And indeed from the case, that gave occasion to the act, discharging a proof of the tenor by witnesses, as therein recited; it appears to have been insisted for by a defender to delay the pursuit. So that action for proving the tenor of such writings does not seem to be thereby excluded; especially as to such as should happen thereafter, which behoved to be on record. And indeed, even the tenor of decrees may be proved, where the adminicles are strong and pregnant^e.

7. The tenor of letters of horning, and even decrees may be proved.

^e Dirlt. decis. 283.

A PROVING of the tenor of a writing may be repeated against an improbation of it, in which case the court will stop certification for some short time, till the event of the tenor. A decree of proving the tenor is equally probative with the principal writing itself, and in every respect stands in place of the same.

8. Such action may be repeated; the import of a decree of tenor.

THE lord Stair states the case of one's whole writings of his estate being destroyed by fire, or other accident, that he may get himself cognosced heritable proprietor, on a proof by witnesses, before a jury, That he, and his predecessors or authors, possessed as such; and that, on producing the Verdict, he will obtain a charter from the crown; that he had observed this done^f. This was after the example of our ancient course above remarked. How far such procedure can be supported at present, is a question? And, if the predecessor stood infest, the person who suffered such misfortune may obtain himself served and infest in the lands, as heir to him, since extracts of the retour and seisin will be sufficient evidence to the jury of the predecessor's right in such calamitous case. And this will certainly hold as to the king's immediate vassals; for the crown never excludes the ancient heritable possessors, as his lordship justly reasons. And we may further observe, that the king's kindly tenants are holden as heritors of their several possessions, without documents in writing, as in the case of those of Lochmaben. In other

9. How far, where one's whole writings of his lands are accidentally destroyed, the tenor can be made up on a proof by witnesses, before an inquest, and their verdict. Where such calamity happens, an act of parliament sometimes granted for facilitating the proof of the tenor.

^f Lord Stair, b. 2. tit. infestments, &c. p. 195.

cases,

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cases, it would seem That the party must procure a decree of proving the tenor of his lost rights, or depend on the justice and discretion of his authors to renew them. In the case of such calamity happening upon a public occasion, as where rebels, in possession of the country, destroy or carry off mens writings, the legislature mostly interposes, by an act facilitating the supply of such deeds, otherwise than in the ordinary course of proving the tenor, as was done after the late rebellion^a. And which hath been done upon other occasions, as where a public register was destroyed by fire. And it would seem, that in the case of a private party's whole writings being consumed by such accident, the like remedy may be granted, necessary precautions being always adhibited, to prevent fraud in patching up fictitious deeds.

^a 20 Geo. II.

10. How far the equivalent to a proving the tenor is admitted by the law of England.

THE law of England, in cases where one's deeds, or other writings, are destroyed by fire, or other accidents, allows a proof of them, and of the way they were destroyed, in the trial of any cause thereon depending, the necessity of the case requiring such proceeding^b.

^b Vin. (necessity) p. 536.

T I T. XXX.

Proof by Witnesses.

1. A proof by witnesses generally esteemed in our law less firm than that by writing.

DEPOSITIONS, or Testimonies of witnesses, are an ordinary mean of proof, and are Evidence in the most proper sense; and in improbation of writings they are prevalent over the writings thereby improven. But mostly writing is esteemed a more firm probation than witnesses: for, as I have shown, the rule is, That writing cannot be taken away by witnesses^a. And in many cases a proof by witnesses is rejected; thus nuncupative legacies, viz. such as are left by word only, beyond 100 l. Scots, cannot be proved by witnesses, nor can verbal promises, to the smallest amount; and writing is essential to the constitution of divers deeds, as has been elsewhere observed^b. But where writing uses not to be adhibited, as in bargains about moveables, to the greatest extent, witnesses are admitted within five years after the cause of action, and current account of furnishings, within three years of the last article, as I have shown in the proper place^c. And on various other occasions witnesses are a good mean of proof, and generally in crimes they are the only evidence.

^a Sup. tit. 26. proof by writing.

^b B. 1. tit. 11. § 23, &c.

^c B. 2. tit. last. § 27, 29.

2. Two witnesses requisite, unless by special statutes it be otherwise provided.

Two witnesses concurring are requisite in the proof of any matter of fact, unless it is expressly provided otherwise by statute; as the case is in some occult frauds relating to the customs or excise, or to a beneficial manufacture, and on other occasions. Thus, by the late statute, for the better preservation of the game^d, offences against the same may be proved by one credible witness.

^d 24 Geo. II. c. 33.

3. What if the witnesses on the one side and other are contradictory.

WHERE witnesses, upon one side, depose inconsistently with those on the other, the character of the witnesses, and credibility of their testimonies, as well as their number, are to be considered, in order to give the preference; in such case, *Testimonia non sunt numeranda, sed ponderanda*^e, the most worthy are to be credited.

^e L. 3. § 1. ff. de testibus.

THE

^a2 Stat. Rob. I.
c. 34.

^bFount. Feb.
22. 1709.
Taylor.

^cJan. 17.
1712. Men-
zies.

^dVoet. ad tit.
de testibus,
§ 2. inf.
^eArg. l. 5. ff.
de reg. juris.

^fNicol (wit-
ness) Jan.
1623. mini-
ster of Jed-
burgh.
^gJune 22.
1672. town
of Inverness.
June 14.
1709. Mac-
kenzie.
Fount. Jan.
14. 1700.
Mackenzie.
^hJan. 17.
1679. lord
Hatton.

THE rule as to the competency of witnesses (called, for most part with us, their Hability) is, That all persons may be witnesses, except such as are prohibited by law, of whom we have a long list in our old law ^a, but which is much varied since by later practice. Some regularly are incapable of bearing testimony, others in particular cases only. Again, sometimes witnesses, otherwise incompetent, are received in particular cases, on account of the difficulty of proof, as in occult crimes or domestic affairs; and some who are competent have the privilege to decline witnessing, and so cannot be compelled to depose. Those who are Infamous, *infamia juris*, as being convicted of crimes inferring infamy, or declared such by the sentence of a proper court, or found guilty of perjury, are regularly altogether incompetent, it being presumed, they will not regard the awful solemnity of an oath; but *infamia facti*, as doing penance in the church for adultery, is not regarded ^b. An Atheist-infidel cannot be a witness, but a Jew or Mahometan may, because he owns the Being of God; to whom alone appeal is made in an oath. And therefore if one declares his acknowledgment of God, the objection is removed, tho' he does not believe the blessed TRINITY of Persons, or even denies revealed religion ^c. This last cannot hold in England, or before our court of exchequer; since, by their form, witnesses must be sworn upon the Bible, which cannot take place, unless they own it; or at least the Old Testament, as is the case of the Jews.

PERSONS within the age of discretion or Pupillarity, are supposed not to know the import of an oath, and so cannot be allowed, in their infant years, to bear testimony. And some learned authors are of opinion, that they cannot be received afterwards, to depose upon facts that happened during their pupillarity ^d; but which may justly be doubted, if the party was past the years of infancy when the things happened, being, at such age, presumed capable of observation ^e. But furious persons cannot be admitted to depose, even in their lucid intervals, upon things which fell out during the time of their fury, being then supposed altogether incapable.

It is self-evident, That persons cannot be admitted witnesses in their own causes, or where they are to gain or lose by the event; but, tho' they have an interest in the subject of debate, they may be produced against third parties, who are on the same side as to a collateral point of the question, but they are incompetent witnesses for them ^f. Burgeses may be witnesses in matters concerning the common good of the community; for it does not belong to the particular burgeses, but to the corporation, as such ^g. But where the particular burgeses may be affected with the event of the question, they will be rejected ^h. Capital enmity is sufficient to set one from being witness against the person to whom he bears it; but expressions of enmity will not be regarded, if the witness purge himself of malice upon oath. Therefore the facts or circumstances, whence the enmity is inferred, must be particularized and proved by the person who would have the witness rejected; for otherwise the witness may use these expressions, designedly to get himself rejected from deposing against his friend.

4. All persons may be witnesses that are not prohibited. Persons, infamous, *infamia juris*, and athiest-infidels are simply rejected; how far other infidels who own the being of God, tho' they deny the Christian religion, are admitted.

5. Persons may be witnesses to prove facts that happened during their pupillarity; but not lunatics, as to what happened in the time of their fury.

6. How far can persons be admitted in a cause, wherein they have an interest; the case of capital enmity in the witnesses; or of burgeses, in the affairs of the community.

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7. The receiving good deed, giving partial counsel, or offering to be witnesses, good objections to their being received.

PERSONS who have received Bribes or good deed, or got promises of the same to depose in the cause, or have prompted the party to the action, or given partial counsel therein, or ultroneously offered themselves to be witnesses, or were instructed how to depose, cannot be admitted^a. But That will not hinder one from inquiring at persons What they know of the matter; nor will a discovery, in that manner, be any exception against the witnesses, because the motion does not come from them, and it is necessary that the party know whom to cite.

^a Jan. 1. 1671. lady Milton. Fount. June 17. 1707. Livingston. Harc. (probation) Feb. 1682. lady Cranston.

8. Servants may be witnesses against, but not for their masters.

SERVANTS cannot regularly be witnesses for their masters, tho' they may against them; and, if they were dismissed the service after the citation, or in order to qualify them to be witnesses for their masters, they will still be rejected, that being *Fraudem facere legi*^b. The master is a good witness for or against the servant^c.

^b Fount. Feb. 5. 1709. lady Cardrofs. ^c Balf. May 5. 1542. Pi. cardie.

9. What relation good to call a witness.

PERSONS in such Relation, that would be a ground for declining them as judges, cannot be witnesses for their kinsman, but are good against him. Judges may be declined, who are father, son, brother, uncle or nephew to the pursuer; and the same relation by affinity, except in the case of uncle and nephew, is a sufficient objection^d. The reason of the thing, and precedents in the court of session, shew, that this rule may be applied in respect to witnesses. Thus, a brother-in-law was found not receivable, even after the death of the producer's sister, which made the tie between him and the witness her husband^e. But an uncle-in-law was admitted^f; and therefore a cousin-german, who is in a remoter degree, would certainly be a good witness; and indeed, neither the one or the other is considered as a Conjunct person, in the decisions upon the act 1621, and consequently no partial favour is presumed in them. If the relation of the witness is by unlawful conjunction, upon the part of the reputed father, it is no objection^g; for in that respect a bastard is esteemed in law to have no father, and to be *nullius*; but, if it is on the part of the mother, the exception is equally good, as if it were by marriage, the mother being always certain.

^d P. 1681. c. 16.

^e Jan. 15. 1679. Brown. ^f Bruce Nov. 30. 1716. Moncrief.

^g Nov. 6. 1624. Aikman. Had. Nov. 22. 1622. Grant.

10. What if the relation is equal as to both parties. One may cross interrogate his relation led by the other party.

A WITNESS may be rejected on propinquity to the producer, tho' he be in the same, or even nearer relation to the objector^h; because partial affection is presumed still to influence him. Where one produces a witness within the forbidden degrees, as to the adverse party, it is regular for such other party to cross interrogate him, from which the relation of the witness cannot bar him: but, if That is neglected, he cannot be examined by his near kinsman, notwithstanding the other party's having used himⁱ; because, in the first case, the whole truth ought to be expiscated; whereas, in the other, the general rule holds, That the party must prove his allegations by competent witnesses.

^h Nov. 6. 1624. Bonington. Had. Nov. 20. 1602. Grant.

ⁱ Nov. 24. 1709. Monteith.

11. Husband and wife not good witnesses; sometimes a child admitted for one parent

HUSBAND and wife cannot be witnesses for each other; and the lords of session found, That a wife could not be admitted against her husband^k. And parents and children cannot regularly be witnesses for or against one another; but children were admitted witnesses for proving

^k June 1744. Crawford of Keir.

^a Falc. March
5, 1748.
Cuming.

proving their father's maltreating their mother, in order to her obtaining a separate aliment ^a.

against the
other.

^b Dir. decif.
441.

ADVOCATES, writers and agents, cannot regularly be witnesses for their clients in the causes wherein they are concerned; but in other causes they may. Nor can they be produced against the client, so as to propale the secrets of the cause, or such matters which they know only from their client's information: and even one's being present, when the cause was advised by the lawiers, is sufficient to set him from being a witness ^b; for thereby he gives partial counsel, or states himself as a party.

12. In what
respect may
advocates,
writers, and
agents be
witnesses;
one's being
present when
the cause is
advised, a
good objecti-
on.

^c Fount. July
18. 1678.
lord Rollo.

TUTORS and curators cannot be witnesses for their minors, tho' they may against them, in matters which will not subject themselves ^c; for they are parties, where they are accountable to the minors, and so cannot be used as witnesses. *Proxenetæ*, or Brokers, by the civil law could not be witnesses concerning things transacted by them without consent of both parties ^d; but, by the present custom, they may be used by either party without consent of the other ^e.

13. Are tutors
and curators,
or brokers,
good wit-
nesses.

^d Novel. 90.
c. 8.
^e Voet. § 8.
hoc tit.

A CREDITOR may be witness in the cause of his debtor, or a cautioner in that of a co-cautioner, if such debtor or co-cautioner are abundantly solvent; but otherwise, in a civil action, they may be suspected, as deposing in a matter where they may gain or lose, in the event, their payment or relief perhaps depending thereon ^f. A blind man may be a witness as to things that do not depend on the sense of seeing.

14. In what
cases may a
creditor, in
the cause of
his debtor,
or a cautioner
be a witness;
may a blind
man be wit-
ness.

^f Harc. (pro-
bation) Jan.
1682. Hay.
Fount. Dec.
23. 1692.
Brisbane.
Dec. 15.
1701. Alifon.

SOME cases require, That all persons capable of observation be admitted witnesses, as above hinted. Thus, in occult and domestic crimes, all persons are receivable, that are supposed capable of knowing what happened, tho', in other cases, incompetent; because, from the nature of the thing, there is difficulty in the proof, and otherwise these crimes might pass unpunished; and in other cases also, where, from the nature of them, there is a penury of witnesses presumed ^g. Thus likewise infamous whores are admitted to prove criminal conversation, in these houses where 'tis presumed people of better character do not frequent: and the evidence of brothers and sisters is admitted in a proof of clandestine marriages, such near relations being generally the only persons called thereto ^h.

15. In some
cases, all per-
sons capable
of observati-
on must be
admitted wit-
nesses, tho'
otherwise in-
competent.

^g Dec. 9.
1666. Thom-
son. Gosf.
Nov. 22.
1668. Mac-
Kenzie.
^h Home (wit-
ness) July
31. 1732.
Barber.

AND which is more extraordinary, sometimes the party injured may be produced as a witness to prove the fact, where the prosecution is at the instance of the public, as in an indictment for robbery on the high-way, rape or forcible marriage ⁱ; because otherwise the crime might escape punishment, and the party is not to gain or lose by the event of the trial.

16. Some-
times the
party injur-
ed admitted
a witness.

ⁱ July 22.
1751. king's
advocate a-
gainst Gray,
&c.

^k Decem. 26.
1630. lord
Johnston.
June 28.
1637. lo.
Dunipace.

It is likewise to be observed, That incompetent witnesses, even in civil cases, are sometimes examined by the court of session, *Ex officio, ad informandam conscientiam judicis*, viz. to expiscate the truth in some intricate obscure transactions, reserving to themselves the import of the objections ^k. This is after the course of the law of

17. Incom-
petent wit-
nesses exa-
mined ex of-
ficio.

England,

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England, which allows witnesses of the nearest relation or connection to be examined, leaving to the jury to consider the weight of the exceptions, as shall be shown in the observations subjoined. The above procedure is one of the particulars in which the court of session exert their *nobile officium*, as I have set forth above ^a.

^a Sup. tit. 7.
§ 24.

18. Witnesses cum nota. The causa scientiæ.

It appears from the premises, and nature of the thing, That some witnesses are unexceptionable, *Omni exceptione majores*. Others again are liable to some objections, and yet received: those are generally admitted only *cum nota*, that is, That full credit is not to be given them, but that their testimonies shall adminiculate or aid the proof. Witnesses, in many cases, ought to give a special *Causa scientiæ*, viz. the ground whereupon they know the truth of what they have deposed; and the stronger That is, they merit the greater credit.

19. How far a witness may obtain his deposition to be rectified.

If, upon recollection, a witness finds himself to have been in a mistake as to any particular, he may recently apply to get it rectified. But cannot insist to have himself re-examined, *ad exonerandam conscientiam*, viz. on pretence of exonerating his conscience as to what he had formerly sworn, for that is acknowledging himself foresworn; and to indulge people in such case, were to open a door to enervate all testimonies ^b.

^b Fount. July 16. 1701. Irvine.

20. In what cases are women admitted, they are not receivable in writings.

Of old, with us, Women were rejected from being witnesses in most cases, but now they are for most part admitted; unless where the parties ought to have called witnesses, for then they have themselves to blame that did not make use of others ^c. And therefore women are altogether incompetent witnesses to deeds of parties, testaments, or instruments of notaries, as I have shown elsewhere ^d. But, by the prescription of the civil law, they were admitted in all deeds and instruments, except testaments, as to which they were rejected ^e. Nor regularly are they admitted, as evidence of bargains provable by witnesses ^f. But in crimes they are always receivable, these generally being founded upon palpable facts.

^c Jan. 13. 1737. Wiseman.
^d B. 1. tit. 11. § 27.
^e L. 20. § 6. ff. qui testam. fac. &c.
^f Dalr. Dec. 13. 1715. Waugh.

21. Moveable tenants good witnesses; the objection, that the witness is not worth the king's Unlaw, how far good.

MOVEABLE tenants, or such as are not under tack, for terms to run, could not, of old, be witnesses for their master, from the presumed influence he might have over them; but now they are generally admitted ^g. And indeed, the reason for rejecting them ceased, by the act which enjoins a regular warning of tenants ^h; so that, in a proper sense, there were no moveable tenants ever since, viz. such as might have been summarily ejected, according to the ancient usage. Thus likewise the exception of Poverty, viz. That the witness is not worth the king's Unlaw, or 10 l. Scots, the common fine, of old, for absence from courts, or small delinquencies, was much more respected formerly than at this day. It only can be proved by the witnesses's own oath; and, if his veracity is otherwise unsuspected, he will not be rejected on that head; especially, if he be in service, or have a trade, or even be a day-labourer: but a common beggar will not regularly be received ⁱ.

^g Harc. (probation) Nov. 3. 1687. Pounie. Hume (witness) p. 522. Jan. 15. 1735. Blackadder.
^h P. 1555. c. 39.

22. Instrumentary witnesses liable

INSTRUMENTARY Witnesses, or Subscribing Witnesses to deeds of parties, are liable to none of the objections that lie against witnesses to facts,

ⁱ Nov. 24. 1709. Armstrong. Nic. (witness) Jan. 1623. minister of Jedburgh.

facts, or verbal contracts, being received by consent, so far as concerns the form of the deeds, as vested with the due solemnities. But as to any extraneous facts, in order to invalidate or support the deeds, they are in the same case with other witnesses, and may be objected to on the same grounds; as to prove death-bed or convalescence of the party, at the time of granting the deed in question, to which they are subscribing witnesses^a. I have treated elsewhere more at large of instrumentary witnesses^b.

^a June 19.
1712. creditors of Or-
biston.

^b B. I. tit. II.
§ 25.

A WITNESS is not bound, nor can be compelled to depose in matters that may infer turpitude or disgrace upon himself; but in such case he may dispense with the privilege, the maxim being, that *Nemo Tenetur jurare in suam turpitudinem*, None can be Compelled to swear in matters that tend to his own dishonour.

to no objec-
tion as such;
but as to ex-
traneous
facts, confi-
dered as other
witnesses.

23. A witness
not bound to
swear to facts
that may in-
fer disgrace
upon himself.

WITNESSES are cited, on a first diligence, to compear and depose; and if they disobey, a second diligence will be granted for apprehending and imprisoning them, unless they find caution to compear at the day limited, and in that case they lose their expences to which they are otherwise intitled. The same course is taken against persons cited as Havers of writings; for they are to answer, upon oath, as to the writings in question. Before witnesses can be examined, they must be sworn to tell the truth, and purged, as set forth in the next title, and they are examined separately, that they may not hear what one another deposes. If they cannot travel, a commission, in most civil cases, will be granted for taking their depositions; as likewise if they live in foreign countries. Such commissioners regularly are not intitled to a gratification, but their clerk is, and their expences must be defrayed by the party that leads the proof before them^c. If witnesses offer themselves without being cited, they are termed Ultraneous Witnesses, and are rejected, as presumed to have a bias in favour of the party^d.

^c Nov. 20.
1746. Na-
pier.

^d Fount. June
14. 1709.
Mackenzie.

24. Means of
compelling
witnesses to
come in and
depose; if
they cannot
travel, or live
in a foreign
country, a
commission
granted; ul-
traneous
witnesses,
who.

WITNESSES are generally examined before one of the ordinaries upon the witnesses; but in matters of great moment, as in questions of Falsehood, and Proving the tenor of writings, the witnesses regularly must be examined before the lords in presence, or two ordinaries must be present at taking their depositions. This circumspetion is used; because the importance of these cases requires such solemnity.

25. Witnesses
in forgery,
and proving
the tenor of
writings,
must be ex-
amined either
by the lords
in presence,
or by two
ordinaries.

FORMERLY witnesses and parties were examined only before the judge and clerks^e, and their depositions were sealed up till the cause came to be advised by the lords, which was done with close doors, as all other matters were, without calling the parties or their lawiers; and, after advising the same, they were again sealed up^f. But now they are taken in presence of all concerned, and advised openly, after hearing parties; and for the more distinct apprehending the import of the proof, a state of the process is made up, wherein the testimonies ought to be methodically digested.

^e P. 1537.
c. 53.

^f Act of fed.
Jan. 24.
1673.

26. Of old
witnesses
were exa-
mined, and
their deposi-
tions advised
by the lords
with close
doors, but
now with o-
pen doors.

WITNESSES regularly are only examined upon points admitted to proof; but sometimes, when they are old or infirm, or they are in-
VOL. II.

27. The oaths
of witnesses,
on extraordi-

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nary occasions, are taken to lie in retentis.

tending to go abroad, the court allows their depositions to be taken to lie *In retentis*, i. e. to remain in the hands of the clerk till there be occasion for the same; which, in extraordinary cases, is even allowed before the days of comparance are run^a. But if the witnesses are still living when the cause comes regularly in, they ought to be re-examined, if the adverse party insist for it; which is conform to the custom in other countries, and this point of form is derived from the canon law^b.

^a Fount. Decem. 9. 1685. Hamilton. Feb. 28. 1696. Earl of Lauderdale.
^b Cap. 5. ext. de test.

28. How the testimonies of witnesses are to be given and authenticated; affidavits allowed in actions in the plantations.

TESTIMONIES of witnesses are to be taken down in writing, in all civil cases, and in criminal, for capital crimes, and the witness and the judge, before whom they are emitted, must sign the same, or the judge alone, if the witness cannot write. And all witnesses must give their evidence *viva voce*, before the competent judge, or on a commission from him, as the rule in the civil law directs; *Testibus, non testimoniis credendum*^c, i. e. The witnesses themselves, and not their extrajudicial testimonies are to be credited, and which is likewise the case in the law of England, as shall presently appear; for the credit that is due to the testimony depends much on the manner of the witness's behaviour at deposing. But there is an exception from this rule by special statute^d, viz. That where any person in Britain has actions depending before the courts, in the plantations in America, Affidavits in writing, upon oath, before the chief magistrate of the borow, in or near which the witnesses reside, certified and transmitted under the common seal of such borow, or the seal of the office of such magistrate, shall be allowed to be of the same force as if they had been given in the court, or on commission from the same.

^c L. 3. § 3. ff. de test.

^d 5 Geo. II. c. 7.

Observations on the Law of England, in relation to the Premises.

1. Regularly husband and wife are not admitted as witnesses for or against one another.

HUSBAND and wife, being as one and the same person in affection and interest, can no more be witnesses for one another than for themselves; nor regularly shall the one be admitted to give evidence against the other: but some exceptions have been allowed against this general rule, in cases of evident necessity^a.

^a Hawk. P. C. book 2. c. 46. § 16.

2. One of the judges or jury may be a witness against the defendant; in what cases may accomplices be received; or one of the defendants for the other.

It is no exception against a witness giving evidence for or against a prisoner, That he is one of the judges or jurors that are to try him; nor That the witness hath confessed the same crime charged against the prisoner, if he has not been indicted for it; for if no accomplices were to be admitted as witnesses, it would generally be impossible to find evidence to convict the greatest offenders; and even accomplices who are indicted are good witnesses for the king, till they be convicted. It hath likewise been adjudged, that such of the defendants in an Information, against whom no evidence is given, may be witnesses for the others^b.

^b Ibid.

3. Persons convicted of crimes, or outlawed for crimes, are rejected from giving testimony.

A PERSON shall be disallowed to be a witness in respect of his being attainted, or even convicted of treason, felony, piracy, *præmunire*, perjury or forgery, or adjudged to stand on the pillory, or to be whipt or branded. Outlawry in crimes, but not in a personal action, is a good exception against a witness, as it is against a juror^c.

^c Ibid. § 21.

IN-

TIT. XXX. Observat. on the Law of England, &c. 651

IN all cases whatsoever, it is a good exception against a witness, That he is either to be gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. But it appears, from daily experience, that generally, in a criminal information, one is a good evidence to prove the offence, notwithstanding the objection That he may have an action, at his own suit, for damages on the same ground; for tho' the offender be convicted at the suit of the king, yet this shall not be evidence in an action brought by the party ^a.

^a Ibid.

UPON this rule it hath been doubted, How far freemen of a corporation, or the inhabitants of a hundred or parish, should be admitted as witnesses in matters which concern those places; but every such case must stand upon its own particular circumstances, viz. it must be adverted whether the interest be of that nature, or so considerable, as by presumption to infer partiality in the witnesses ^b.

^b 2 lev. 241.
Bac. new abr.
(evidence)
14.

IT is no good exception against a witness That he has his expences from the party; for every one may maintain his own witnesses; nor is it, That he has received a reward for having made a discovery of the crime to be proved against the prisoner; or That he hath a promise of a pardon, or other reward, on condition of giving his evidence; unless it be for giving such and such particular evidence ^c.

^c Hawk. ibid.
§ 25.

IT has been held to be a good exception, that the witness is an Infidel, that is, That he believes neither the Old nor New Testament to be the word of God, upon one of which the law of England generally requires the oath should be administered. And want of discretion is a good exception; but, in some cases, an infant of nine years of age has been admitted to give evidence. But it is agreed, that it is no good exception against a witness That he is an alien, villain, or bondman ^d.

^d Ibid. § 16.

THE examination of witnesses, *viva voce*, in open court, is justly esteemed one of the greatest excellencies of the law of England, and therefore it is a settled rule, That, in cases of life, no evidence is to be given against a prisoner, except in his presence. But it is said, That if a witness, by reason of sickness, or other inability, cannot travel, he may, by order of court, be examined in the country, before any judge of the court where the cause depends, and the testimony so taken shall be allowed as evidence at the trial ^e.

^e Bac. new abr. (evidence) 296.

IT is a general rule, That a witness shall not be asked any questions, the answering to which might oblige him to accuse himself of a crime; and his credit is to be impeached only by general accounts of his character, and not by proofs of particular crimes, whereof he never was convicted ^f.

^f Bac. ibid.

IN an action against the hundred, by a party robbed, he will be a good witness to prove himself to be robbed, and of what sum or things he was robbed: and likewise that he gave notice to the next vill, and levied hue and cry; because it is of necessity for want of other proof ^g; but then his testimony must be corroborated by collateral

^g Vin. (trial)
p. 364.

4. The exception good, that the witness is to gain or lose by the event of the cause.

5. How far can freemen of a corporation be witnesses in matters concerning its interest.

6. A witness intitled to his expences; is he to a reward; the case of a promise of a pardon for giving evidence.

7. It is a good exception against a witness that he believes neither the Old nor New Testament; the case of an infant, an alien, or a bondman.

8. Witnesses ought to be examined in open court, especially in cases of life; what if they are unable to travel.

9. A witness is not bound to answer any question whereby he might accuse himself of a crime.

10. In an action against the hundred, the party robbed is a good witness; but his

proof

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testimony
must be cor-
roborated by
other cir-
cumstances.

proof and circumstances, such as may induce a jury to believe that a robbery was actually committed, and that the party lost what he alleges^a. The action is only to be sued against the high constable of the hundred, who hath his relief against the other inhabitants, both as to what he pays to the party robbed, and his costs of defending against the suit^b.

^a Bac. new
abr. (hue and
cry) 73.

^b 8 Geo. II.
c. 16.

11. In an in-
dictment for
stolen goods,
the owner is
a good wit-
ness.

In some criminal cases interested persons are allowed to be witnesses; as in an indictment of felony for stolen goods, the evidence of the owner is good, tho', upon conviction, he is intitled to restitution. And tho' the informer, upon conviction of one for robbery, be intitled to a reward of 40 l. his evidence will be received; for the intention of these acts is intirely defeated, if the rewards should take off his evidence^c.

^c Vin. ibid.
p. 369.

12. In indict-
ments for
cheats, some-
times the
party admit-
ted a witness.

In other cases likewise the party himself may be a witness, where the necessity of the thing requires it: thus, in an indictment for a cheat done to one, by imposing upon him a quantity of beer, mixed with vinegar and the grounds of coffee, for port-wine, the party so imposed on was admitted a witness to prove the fact upon the trial; for, in such private transactions, no body else can be a witness of the circumstances of the fact, but he that suffers. And it is a general rule, That such evidence as the nature of the thing will bear must be admitted^d.

^d 1. Selk.
rep. 286.

13. Relation,
alliance, or
other con-
nection, no
good excepti-
on against a
witness;
what if one
be infamous,
or not of
years of dis-
cretion.

Tho' a witness be of the nearest alliance or kindred, or of counsel, tenant or servant to either party, or any other exception that makes him not infamous; or to want understanding or discretion; or a party in interest; he shall, notwithstanding, be sworn and examined; and his credit, upon the exceptions taken against him, is referred to those of the jury, who are tryers of the fact^e. But a counsellor at law is not bound to make answer to things which may disclose the secrets of his client's cause imparted to him^f.

^e Vin. ibid.
p. 371. Coke
1. inst. 6.
^f Styles, 449.
Waldroun
v. Ward.

14. Such ex-
ceptionable
witnesses may
be regarded
by the jury
or not, as they
see cause, the
exceptions
being always
made.

OUR law, in the main, agrees with that of England, except that we generally reject witnesses on account of nearness of relation, or of their being of counsel, or servant to the party who intends to make use of their oaths. But this makes no great difference; for the exceptions are always made by the usage of England, and the import of them is in the breast of the jury, and it depends on the credibility of the witnesses, and the circumstances of the point in issue, whether such witnesses shall be credited or not.

15. Women
good wit-
nesses to
deeds or tes-
taments.

It is observable That women are adhibited as witnesses to deeds of parties and testaments, in the same manner as men, by the usage in England, which is otherwise with us, as I have shown in the foregoing title. And they were likewise admitted in all cases among the Romans, except in testaments^g, which required divers anxious solemnities, disused by the modern laws of most nations; so that, in this particular, the law of England follows the prescription of the civil law more than ours does, which is seldom the case.

^g L. 20. § 6.
ff. qui test.
fac. &c.

T I T. XXXI.

Reprobator of Witnesses.

WHEN one suspects witnesses produced against him of Falshood, he ought, before their deposing, to Protest for Reprobator against them; and thereafter may insist in an action of reprobator for getting their testimonies reprobated or rejected, and the decree that proceeded thereon set aside. But if he does not so protest, he is presumed to pass from all objections against them, and therefore regularly cannot insist in such action^a, except in some cases, as after-mentioned. And because sometimes reduction of decrees, on reprobation of witnesses, is calumnious, and the presumption lies in favour of the veracity of the witnesses, the court, in such cases, ordain the pursuer to consign a sum of money, to be given up to the defender, if the action is found calumnious^b.

^a June 5.
1737.
Wright.

^b Decem. 13.
1637. Robi-
son.

REPROBATOR of testimonies of witnesses regularly can only hold, by canvelling or controuling their oaths, as to the Initials of their testimonies, or as to their cause of knowledge, or *Causa scientiæ*; for, in that respect, they are not *Contestles*. Or by objections sufficient to have cast them, whereof the party was ignorant, or had not a proof ready at their deposing. But otherwise the testimonies of two unexceptionable concurring witnesses cannot be reprobated, as to the substantials of the same, by other witnesses deposing the contrary; because, at that rate, there would be no end; for those reprobatory witnesses might again be redargued by others, and so on *in infinitum*.

1. Reproba-
tor of wit-
nesses; some-
times the
court ordain
the pursuer to
consign a sum
to be forfeit-
ed if he suc-
cumb.

2. How far
reprobator
lies against
two witness-
es, as to par-
ticulars
wherein they
concur.

THE Initials of a witness's testimony are Preliminary questions put to the witness, chiefly to try his veracity and competency; but which is done before he is examined upon the merits, as whether he has given any partial council in the cause, bears any malice against the adverse party; or if any person has given him, or promised him any bribe, (we call it Good Deed) to depose in the cause, or instructed him what to swear, or prompted him to be a witness? This, in our law, is termed To Purge the witness, *i. e.* that he clear himself of objections or exceptions that might otherwise lie against his being received. This, in England, is called To examine the witness upon *Voire dire*. If he shall be afterwards redargued as false, in any of these particulars, his testimony upon the merits is generally rejected or set aside. Witnesses are competent in this case, in order to disprove what the witness under reprobator hath deposed; because his oath, in that respect, is taken by the judge *ex officio*, and not upon the deference of the adverse party, even tho' he should put these or other questions to the witness, in order to have him rejected^c; for still That is only to expiscate the truth, but does not infer a Reference by the party of the points deposed on to the witness's oath.

3. As to the
initials of
witnesses tes-
timony, it
may be re-
dargued, tho'
the party who
is to use a
reprobator
against the
witness put
the questions
to him. Purg-
ing a witness,
what.

^c Jan. 31.
1671. Mil-
toun.

WHERE reprobators are competent, it may be a question, if the reprobatory witnesses can be redargued by others? And, if we regard the decision of the canon law, the rule is, That a fresh reprobator may be brought against them, but there is no farther progress;

4. Can repro-
batory wit-
nesses be re-
dargued by
counter-re-
probatory
for

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witnesses;
the rule in
the canon
law in this
case.

for there can no reprobator lie against the counter-reprobatory witnesses, in order to prevent the delay of justice; since otherwise there would be no end of reprobators upon the back of reprobators^a. The caution used in our law is, That the reprobatory witnesses should be persons above all exception; so that it may seem, that no counter-reprobatory witnesses should be admitted against them; but we have no law or precedents, that I know, disallowing of such procedure.

^a C. 49. ext.
de testibus.

5. Actions of
reprobator,
duly protest-
ed for, are
competent
either before
or after sen-
tence; the
first most ad-
viseable; re-
probator
sometimes
allowed sum-
marily.

ACTION of reprobator is competent, either before sentence in the principal cause, or thereafter. The regular course would seem to be, that it should be proceeded in before the proof in the principal cause is advised, which might be delayed for a short space, till the proof in the reprobator is concluded, that so an end may be put to the question at once; and, for this reason, the court of session sometimes find, that reprobators are not competent after sentence^b; but this can happen only in the case where no protest was taken for reprobators, at the examination of the witnesses. And indeed, for expedition of justice, the court allows a reprobator, that was duly protested for, to be summarily insisted in, upon a petition from the party interested^c, and which, I conceive, is the most adviseable course; for *Præstat jus intactum servare, quam post vulneratam causam remedium querere*, it is better to prevent a mischief than try thereafter to remedy it. However, as one may not have in readiness his grounds of reprobator, it may be insisted in, after decree in the principal cause; and the party may prosecute such action at any time within the long prescription, which seems an inconveniency; and the lords of session gave once their opinion, that it should be intended within three years after the decree against which it is laid, but that such regulation could not be without an act of parliament^d. The canon law, in such case, limits the action to one year^e, which seems most reasonable; but we have no law confining reduction of decrees on that head, more than upon any other lawful ground.

^b Feb. 6.
1679. Irvine.

^c June 1751.
Irvine.

^d Feb. 20.
1672. Mil-
toun.
^e C. 5. ext.
ut. lit. non
contest. &c.

6. How far
one can re-
probate the
testimonies of
witnesses
produced by
himself.

As to the question, how far one can insist in a reprobator against the witnesses produced by himself, it is very plain, that regularly he cannot, upon grounds that were competent and known to him at the time of the citation or examination; but, if such witnesses have taken bribes from the other party, and which, at the time of examining them, was unknown to the producer, I do not see, why he may not reprobate their testimonies on that ground, or in any such case.

7. Where re-
probator is
insisted in af-
ter sentence,
can the
grounds for
rejecting the
testimony
be proved by
witnesses.

It was strongly contended sometime ago, That where a reprobator was insisted in after sentence in the principal cause, the grounds laid against the witnesses, for rejecting their testimonies, could only be proved by the party's oath who produced them; but the court of session at last, upon an hearing in presence, found, That the grounds of reprobator, either before or after sentence, might be proved by witnesses, but who must be persons above all exception^f.

^f July 14.
1671. Mil-
toun. Feb.
20. 1672.
idem.

8. Reproba-
tor may be
insisted in af-
ter sentence,
tho' not pro-

If reprobators are not protested for, the party against whom the witnesses are examined, is deemed to acquiesce to their competency and veracity; and besides, by such protestation, the party is put on his guard, and may bring other unexceptionable witnesses, which o-
therwise

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^a Feb. 6.
1679. Irvine.
Fount. Feb.
25. 1684.
Newtown.
^b July 30.
1668. Mil-
toun. Fount.
July 13.
1702. Gor-
don.

therwise he cannot do. And therefore, in such case, regularly an action of reprobator will not be sustained, as above hinted, unless the matters of fact, that found the objections against the witnesses, come to knowledge after their deposing^a, or the party who insists in the reprobator was necessarily absent, or not admitted in the action to compear for his interest^b. Wherefore, tho' reprobators may be insisted in after sentence, in the fore-mentioned manner, yet the regular course is, that the person, who intends to insist in a reprobator, protest for the same, and instantly raise and conclude the same, that it may be advised before, or with the principal cause.

tested for, if the facts whereon it is founded are newly come to the party's knowledge, or if he was necessarily absent, or not admitted as a party.

T I T. XXXII.

Probation by Oath of Party, and Confession.

^a L. 2. l. 9.
§ 1. 3. ff.
de jureju-
rand
^b L. 2. cod.
cod. tit.
^c P. 1551.
c. 19.
^d B. 1. tit. 10.
sect. 15.

^e Tit. ff. de
jurejurand.
volunt. &c.

OATH of party is a most unexceptionable mean of proof; for thereby one is made judge in his own cause. It is this that makes an end of all controversies. An oath of party, for probation, is otherwise called an Assertory Oath, and is either an oath of Verity, Credulity or Calumny. An oath of verity, is That whereby the truth of the fact is referred to oath, and is either deferred by the party, or by the judge only. When an oath is made on the deference of the adverse party, it is a kind of transaction, That the matter shall be determined according to that issue; so that, tho' the party fore swear himself, yet the civil question regularly can never again be brought into judgment, the only enquiry thereafter must be, *Si juratum sit*, if the oath to which reference is made be given^a. Perjury, in such case, is said, by the Emperor, to have God for the avenger^b; but the person fore sworn may, by our law, be pursued criminally for that abominable crime^c. And it appears from what is observed in another place, That even the civil question may sometimes be recanvased, viz. Where a party denies upon oath a writing, or its contents, which afterwards, by the writing found, is proved to be false^d. There is no doubt but, with us, an oath extrajudicially taken may, by the agreement of parties, be made the rule for deciding the question betwixt them, as was usual with the Romans^e: but most frequently this is done judicially in an action, where either the pursuer refers his libel or declaration to the defender's oath; or the defender his plea or exception to the pursuer's, and so of the other allegations.

1. Oath of party, either of verity, credulity or calumny; an oath of verity, upon the reference of the other party, ends the civil question; but can a prosecution for perjury proceed; or can such oath be taken extrajudicially.

He to whose oath the point is deferred must regularly either depose, or refer it back to the other party's oath. This Reference to the deferror's oath will not be allowed, if it is done invidiously or fraudulently, when he, to whose oath the point is first referred, knows the matter best, and perhaps the other has a scruple to swear in any case. For this reason, the party that refers back to the deferror's oath, ought first to swear That he is not clear, and does it not calumniously; such reference has the same implied transaction with the deference. If the proposer of an allegation undertakes a proof of it, the other party will be allowed his oath of calumny thereon, unless it is invidiously insisted on; for, in such case, he cannot be bound to swear, since he is able to make out his point in a com-

2. He, to whose oath a point is deferred, must regularly either swear, or refer it to the other party's oath; but such reference sometimes denied; can one be barred from a proof of his allegation, if he re-

use his oath of calumny thereon.

3. Who may defer an oath, or to whom may it be deferred; how far the oath of a tutor, curator or factor, good against the minor or constituent, or of an author against his singular successor.

4. Such oath may take place in all questions civil, and likewise in criminal cases not inferring corporal punishment or infamy; but a negative oath of the defender, in criminal matters civilly pursued, will not bar a criminal prosecution.

5. How far an oath of party beneficial or prejudicial to others; or can the oath of one of the debtors, or of the creditors, profit or prejudice the rest; a bankrupt's oath, or deference to oath, not good against his creditors.

competent way; and, if it were otherwise, those who have not freedom to swear at all, would always lose their causes, tho' ever so just.

ALL persons may defer points to oath, that have the free administration of the subject in question; and it may be deferred to all those who have judgment to swear, and are parties in the cause. The oath of a tutor, curator, or factor, in matters falling under their administration, is good against the minor or constituent; and the oath of the author, in a gratuitous right, is good against the singular successor, even after he is fully vested with the right; but will not be available against an onerous purchaser; unless the matter was made litigious before his right^a. But, if it be judicially given before the author is denuded, then, doubtless, it is effectual in all cases.

IN all questions civil, tho' founded upon criminal facts, or even in criminal prosecutions, where the conclusion is only damages, or a fine insisted in by way of ordinary action or complaint, an oath is a good mean of proof. Thus spuilies, trespasses and riots, inferring damages or a fine, may be proved by oath of the committer^b; because a decree, in such action, infers no infamy. But, where corporal punishment is to be the consequence, the libel cannot be proved by oath of party. In cases inferring infamy, the party is not obliged to depose, one's fame being equivalent to his life. Sometimes it is allowed in crimes, by express statute, as in the case of usury^c, but that crime does not infer infamy in a legal sense, tho' it is a scandalous practice, justly punishable by the loss of the debt, and treble the value of the sums exorbitantly covenanted^d. In those cases of riots, &c. an oath denying the facts will not exclude a criminal prosecution on the same facts, at the fiscal's instance; because it is not between the same parties. Nor can the deed of the private party, in referring the facts to oath, prejudice the action at the suit of the public^e.

IT is a certain rule, *Jusjurandum unius, alteri neque nocet, neque prodest*^f. That an oath cannot be beneficial or prejudicial to others, than those who defer or refer it, and their successors in the right, either singular or universal. The oath however operates in favour of all those who are conjunctly and severally bound in the same obligation, and their cautioners. And the oath of a cautioner will profit the principal, Provided, that the verity of the debt itself is referred to oath^g; for there the whole obligation is deposited on; and the creditor, who defers it to oath, has power of the whole, and the negative oath is in place of payment. But one of more debtors for the same sum, referring Payment to the creditor's oath, who deposes *negative*, will not exclude the rest from proving payment any competent way, such reference being truly *res inter alios*. And, for the same reason, the oath of one or more debtors in the same sum, owning the debt, will not be prejudicial to the rest; because, tho' the creditor may prejudice himself, by referring his debt to oath, if the party depose *negative*, yet the oath of one of the debtors affirmative cannot prejudice others. If a bankrupt have a just claim well vouched, and refer it to the debtor's oath, the creditors of the bankrupt may

^a Jan. 26.
1665.
Wright. July
23. 1707.
Burton.

^b Feb. 13.
1634. Edgar.
Jan. 24.
1712. justices
of peace of
Air.

^c P. 1597.
c. 251.

^d 12 Annæ,
c. 15.

^e Arg.
P. 1587.
c. 77.

^f L. 2. § 3.
ff. de jureju-
rando Tit. c.
(res inter ali-
os acta, &c.)

^g L. 28. § 1.
l. ult. § ult.
ff. de jurejur.

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may still prove the debt, and exclude the exception on the oath, with this reply, That the reference was in defraud of them; and, for the same reason, a bankrupt's oath cannot be used to establish a debt in prejudice of his prior lawful creditors^a.

^a L. 9. § 5.
ff. hoc tit.

It has been already observed, that an oath regularly will operate against the party who defers or refers the point to it, and his representatives; but that an onerous singular successor is not bound to admit the oath of his cedent to take away his right duly perfected, tho' the cedent's oath, given before his acquisition, will militate against him. But tho' compensation, for example, cannot be proved against an onerous assigney by the cedent's oath; yet, if the defender prove compensation by the cedent's writing, which the assigney offers to elide by recompensation, That may be taken off by the cedent's oath, because that is not the debt assigned^b.

^b Nov. 7.
1674. Boyd.
Decem. 14.
1679. Crawford.

If the person, to whose oath points are deferred or referred by the adverse party, do not depose at the term assigned him for that end, the term is Circumduced against him, *i. e.* he is concluded as if he had owned the allegations, and he is Holden as confest on them in favour of the other party, and decreed in the same manner as if he had acknowledged the same on oath. But generally he will be reponed, in a suspension or reduction of the decree, upon refunding the whole expence the party is put to thro' his default. However, if he is not reponed, the decree is an effectual debt against his heir. And sometimes the court, upon extraordinary occasions, have refused to repon the party himself to his oath, after a circumduction of the term against him for not deposing; as was adjudged in the case of Wilson of Bakie against Mr. John Arot, not many years since, and Affirmed in the last resort. If the party deposes to the points, either by Affirmation or Denial, the oath will be the rule of judging; but if he depose *Ignorat*, or with uncertainty, the party who deferred the point to his oath, may still prove it otherwise. One may refile from a deference or reference, at any time before the oath is given, upon satisfying the costs the other, perhaps, has laid out in order to his deposing.

6. The cedent's oath not receivable against his onerous singular successor; but a ground of recompensation may be taken off by the cedent's oath.

7. The effect of a circumduction of the term against the party to whose oath a point is referred. If one's oath is *ignorat*, or with uncertainty, the other party may prove the point otherwise; one may retract his reference before the party deposes.

THAT a party may not be insnared into perjury, or at least a suspicion of his having foresworn, the rule is laid down, That if, on the other party's reference, he has deposed negative to a general interrogatory, That he does not owe the debt in question, he cannot be bound to answer to particular interrogatories thereafter, in order to fix the debt upon him^c; and therefore the other party must first put the special interrogatories to the deponent, and thereafter, if he pleases, a general one.

^c Dirlt. decis.
453. Fount.
Nov. 10.
1702. Aitken.

8. If one deposes negative to a general interrogatory, he cannot thereafter be bound to answer special interrogatories.

If the defender refers to the pursuer's oath his Having certain writings, whereby the claim will be found discharged; and he deposes not only as to such writings, but likewise That the debt pursued for is still owing, such oath will not be regarded to bar the defender from his allegations against the pretended debt, even tho' the pursuer had so deposed in answer to interrogatories put to him at his deposing^d; because there was no reference of that point to his oath,

9. A party's deposing as a haver, upon the ground of debt, does not conclude the other party.

^d July 8.
1749. Elliot.

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which he was only to give as a haver of writings as in an exhibition, and he ought not to have answered such interrogatory. And it being the judge who examines the party, his oath, so far as it exceeds the terms of the reference, is taken *ex officio*, and cannot conclude the adverse party.

10. An oath imposed by the judge; an oath in supplement admitted, where there is a *semiplena probatio*. If one witness depose positive for the producer, may the point be referred to the adverse party's oath.

AN oath imposed by the judge is called, in the civil law, a Necessary oath, *Jusjurandum necessarium*; because the party must swear, and has not liberty to refer it to the adverse party's oath^a. With us it is termed either an Oath in Supplement, or of Purgation. The first is frequently allowed to either pursuer or defender, when their allegations are not fully proved, at least as to the quantities; as when witnesses, in relation to damage, give their oath of credulity, That they believe it might extend to so much: or when a merchant proves the most material articles of his accompt, and perhaps has one witness to the rest, the court will allow the party to depose in supplement, and in other cases, where a *Semiplena probatio* is brought^b. But if one undertake a proof by witnesses, he regularly cannot refer to the other party's oath the points at proof, unless the witnesses depositions are not at all to the purpose; for if one witness depose to the verity of the fact, the party might deny it on oath, which would infer perjury against the one or the other, the hazard of which our law by such precaution obviates^c. This seems to be the rule; but a case may occur where circumstances make it necessary to admit a reference to the defender's oath, even after one witness has deposed affirmative to the pursuer's claim, an instance of which did lately occur^d.

^a L. 31. ff. de jurejur. vol. necess. &c.

^b Nov. 25. 1680. Crawford.

^c Fount. Nov. 15. 1677. Thomson. Feb. 26. 1686. Horn. Stair. June 22. 1676. Irvine. ^d June 24. 1747. Law.

11. An oath in litem may be deemed a necessary oath.

AN oath *in litem* may come under this description; for it is in order to supply a proof of the pursuer's damages, and is administered by the judge *Ex officio*, without the defender's reference thereto. I have discoursed fully elsewhere of it^e.

^e B. 1. tit. 10. § 102.

12. How far an oath of purgation takes place with us. Witnesses, before they depose upon the points in issue, are purged of malice, &c.

THE other branch of this kind of oath is an oath of Purgation. This was imposed by the judge on the defender, to purge himself of the grounds of suspicion adduced against him, which was customary by our old law^f; but at present we make little or no use of this kind of oath in temporal courts. However, witnesses are constantly purged of malice against the party, partial council and bribery, before they are examined on the merits of the cause, as is formerly mentioned; and such oath is sometimes used in ecclesiastical courts, to oblige parties to clear themselves of a scandal.

^f Leg. burg. c. 28. quon. attach. c. 20. § 3.

13. An oath of credulity; divers instances of such; the oath of compurgators of old such.

AN oath of credulity is, When witnesses give their judgment or opinion, upon oath, concerning the value of things; or when parties give their oath *in litem*; or where, in a ranking of creditors, heirs, or singular successors to them, depose on the verity of their debts. I find that, by our old law, in all civil cases where the defender cleared himself by his own oath, he was obliged to bring five men to swear That they believed his oath was true^g, which, as to the compurgators, could only be an oath of credulity. We have no such practice now, nor is there any vestige of it in our law-books, except That above referred to, that I know.

^g Quon. attach. c. 5. § 5, 6, 7.

AN

TIT. XXXII. Probation by Oath of Party, &c. 659

AN oath of Calumny is, When one who is burdened to prove any point craves previously the other's oath, If he has reason to deny it; and if he gives not such oath, the fact is holden as proved; or where one offers to prove a point which the other party thinks is but vexatious and for delay; and therefore insists that he may depose, If he has good reason to affirm such points; and if he does not give it, no proof will be allowed him. I have spoken of oaths of calumny more at large elsewhere^a.

^a Sup. tit. 3.
§ 11.

14. An oath of calumny.

THE solemn affirmation of quakers is accepted instead of an oath in the usual form, and hath the same effect, both civil and criminal, as an oath formally given. This was the law of England before the union, and extended to Scotland thereafter^b.

^b 1 Geo. I.
cap. 5.

15. The solemn affirmation of quakers.

OATHS, especially those given upon the deference or reference of parties, frequently contain Qualities or circumstances other than the points referred to oath: these are either Extrinsic or Intrinsic. Extrinsic are such as are foreign to the point referred to oath, and are not regarded as part of the oath, but must be proved by the deponent otherwise. Intrinsic, such qualities as are esteemed part of the oath, and proved thereby. The rule of judging if the qualities are extrinsic or intrinsic seems to be, That those which concern the conditions or circumstances of the bargain, or natural dissolution of it, by Payment, Delivery, or Performance, are intrinsic; for it were unreasonable that one should be allowed to prove the bargain by the other party's oath, and not take it with all the circumstances where-with it was qualified; or that he should establish a debt by one's oath, and not allow him to relieve himself of it, in terms of the contract, the same way. And therefore, in such cases, it is a maxim, that *Juramentum est indivisible, et non est admittendum in parte verum et in parte falsum*, An oath is indivisible, and cannot be adjudged in part true and in part false. All other qualities, or facts mentioned in the oath, towards the deponent's exoneration from the debt, are extrinsic, and resolve into separate defences to exclude the debt, which therefore must be proved otherwise than by the oath. For instance, if one depose he borrowed the money from the pursuer, and paid it to him, or another by his order, this payment is an intrinsic quality; but if he say that the other was owing him as much, and that therefore he owes nothing, this is extrinsic, and resolves into compensation, which must be proved by the adverse party's oath, or other competent way^c.

^c Jan. 3.
1674. Gordon.

16. Qualities adjoined to oaths either extrinsic or intrinsic; these which concern the circumstances of the bargain, or natural dissolution of it, intrinsic, all others extrinsic.

OATHS regularly are administered and taken in judgment, or before commissioners appointed by the court where the suit depends. But, for the more easy dispatch of justice, it is lawful, in any action or suit in his majesty's plantations in America, wherein persons residing in Britain shall be parties, for the plaintiff or defendant, and witnesses, to verify or prove any matter or thing by Affidavits in writing, made before the mayor, or other chief magistrate, where, or near to which the person making the same resides, certified and transmitted in manner directed by the act^d.

^d 5 Geo. II.
c. 7.

17. Affidavits accepted in place of oaths, upon commissions relative to suits in the plantations in America.

IF

18. If one confesses the points referred to his oath, which is accepted by the other party, it is equal to an oath; one bound to confess or deny points alleged by the other party.

IF one Confess the points referred to oath, and the other admits it without an oath, it is equivalent to an oath, and the qualities of the confession are judged upon, in the same manner as in an oath. By an act of federunt^a, a party is bound to Confess or Deny facts admitted to the other's probation; and if he do neither, he is holden as confess thereon; but his denial will not hinder the other to prove them, and will subject the denier to expences, if it appear the facts were consistent with his knowledge. The facts or circumstances libelled, and not denied by the other party compearing, are holden as true; nor will the decree be defective for not proving them. The confession or denial of an advocate is equal to the party's, and its being admitted is sufficient, but the party's may be insisted for.

^a Feb. 13. 1715.

19. How far, after one has made a confession, may he be put on oath.

ALL confessions ought to be signed by the party, or the judge for him, if he cannot write. After one's confession, he may still, before final judgment, be put on oath, if the other suspect his ingenuity; but this ought not to be done without indemnifying him who made the declaration, and if he adheres to it on oath, giving him full costs.

20. Confession before church-judicatories not regarded in temporal courts.

CONFESSION before ecclesiastical courts, of adultery, or other offence that gives scandal, being holden as extrajudicial, as to prosecutions on the same grounds before temporal courts, and only to satisfy church-discipline, and sometimes *Ad exonerandam conscientiam*, is no proof against the party, either as to civil or criminal effects, even tho' it be followed by public satisfaction in the church^b.

^b Jan. 9. 1662. Baird.

21. Upon the pannel's confession before the assize, they must give their verdict, and the judge his sentence according thereto.

IN criminal trials, the pannel's or defender's confession, made in presence of the assize or jury, will bind him equally, as if the facts confessed were otherwise proved. And tho' it is a maxim, that *Confessus pro judicato habetur*^c, i. e. When one confesses the points in issue, he is holden as condemned; yet That must be understood in a sound sense, viz. as to leading a further proof; for the judge must still pass sentence according to the confession. And, in case of a trial for crimes, the jury must return previously a verdict upon it; for the sentence of the judge cannot be otherwise founded in such trials, according to the course of proceeding with us.

^c L. 3. ff. de confess.

22. Torture, of old, used to force confessions from pannels, now abolished.

TORTURE was in use among the Romans, to force a confession from persons under trial for crimes^d; and likewise it was accustomed with us of old, but complained of at the Revolution among other grievances, and it is now justly prohibited by the British statute^e.

^d Tit. ff. de questionibus.

^e 7 Annæ, c. 21.

Observations on the Law of England, in relation to the Premises.

1. Oath of party, either by compulsion or voluntary.

OATHS of parties are either by Compulsion, viz. before judges who have authority to take an oath, as in causes depending before them, where such proof is allowed: which is the case before ecclesiastical courts, and the court of admiralty. Or Voluntary, by consent of the parties, which is also lawful before a person vested with competent judicial authority to administer an oath^a.

^a Vin. (oath) 48.

If

TIT. XXXIII. Probation by Verdict. 661

IF oath is made against oath, this is a *non liquet* to the court that is to judge of the cause; but they will take That oath to be true which tends to affirm a judgment, and not that which is to destroy it; for such proceeding is most for the expedition of justice. In the court of chancery, if there is a contrary proof by witnesses, the cause will be sent to a trial at law ^a.

^a Vin. (oath) p. 49.

REGULARLY a plaintiff at common law cannot prove his Count or Declaration (we call it a Libel or Claim) by the defendant's oath. But, in an action of debt upon a simple contract, viz. That which is without writing, tho' the plaintiff could prove the bargain by witnesses, the defendant has, by the law of England, the privilege to clear himself, by his own oath, That he owes not the debt demanded of him, or any part of it. It is called *Wager of law*, and *Making of Law*; because the law gives the defendant this special privilege to bar the party forever; and therefore his plea is *Nil debet per legem*. It lies likewise upon a parol, or verbal award, and in amerciements in a baron, or other court not of record ^b. This is peculiar to the law of England, and no mischief is said to ensue from it: for it was owing to the party's negligence that he did not take bill or bond for his money originally. If the defendant waive his privilege, and plead to the country, i. e. submit to a trial, the plaintiff must go on with the trial, and bring his evidence before the jury; for he cannot compel the defendant to take such oath ^c.

^b Vin. (lie gager) p. 61, 73.

^c Ibid. p. 74.

WHERE a man is charged as an executor or administrator, he shall not wage his law; for none can be allowed to swear touching another man's deed. And for this reason it is, that, by the law of England, an executor or administrator is not liable to any action of debt, upon a simple contract made with the deceased. And as an infant or minor is not allowed to wage his law, so neither, in any action brought by him, can the defendant wage his law against him, by taking this oath That he does not owe the sum demanded ^d. I have treated more at large elsewhere of this oath ^e.

^d Ibid. 65, &c.
^e B. I. tit. 23. observ. § 29, &c.

IN criminal matters, the oath of the defendant is never competent; but his confession, even in capital crimes of treason or felony, made willingly, and without violence, in open court, owning the crime with which he is charged, is the highest conviction that can be. In cases not capital, if the defendant Demur to the indictment, the court will give final judgment against him, if the demurrer is over-ruled; but, in capital cases, the defendant is admitted to plead over That he is not guilty. However, in civil actions, a demurrer always admits the fact, and imports the acknowledgment of it ^f.

^f Hawk. P. C. b. 2. c. 30. § 1, &c.

2. What if oath be against oath,

3. At common law, the plaintiff cannot prove his declaration, or count by the defendant's oath; but the defendant, in actions on simple contracts, has the privilege to wage his law, or free himself by his oath; this not followed by any bad consequences.

4. An executor cannot wage his law, and therefore is not liable to an action upon a simple contract; nor does it obtain in the case of an infant.

5. The oath of the defendant is never competent in criminal matters; but his confession, voluntarily emitted in open court, is the highest conviction.

T I T. XXXIII.

Probation by Verdict.

THE Verdict of an inquest is, in some sense, *Probatio probata*, a proof tried and ascertained by the inquest; and the judgment of the court proceeds upon the verdict, which stands in place of all evidence, and therefore well merits to be considered here; especially

1. The verdict of an inquest, in some sense, probatio probata. The constitution of

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an inquest of old, and at present; the majority carries it. In England, and before our court of exchequer the 12 jurymen must all agree; they are likewise called an assize or jury.

specially since it comes sometimes to be reviewed by the court of session, as in reduction of services, &c. It was the valuable invention of the feudal law, and unknown among the Romans. An inquest with us of old consisted of 13 persons^a, but now, by inveterate custom, of 15. They are of an unequal number, because the majority carries it; tho', by the law of England, they are only 12 men, who must be unanimous, and which is the rule in suits before the court of exchequer with us, the same being modeled after the English form^b. They are called an *Inquest*, (*Inquisitores*) because they enquire and examine into the facts tried before them; as likewise an *Assize*, from *Affidere*, in regard they sit together upon the proof, and are Assessors to the judges, whom they relieve of any trouble in examining the probation. They are, lastly, termed a *Jury*, (*Juratores*) because they try the matters in issue upon oath, and this is commonly their epithet in England.

^a P. 1469.
c. 36.

^b 6 Annæ,
c. 25.

2. Civil and criminal causes were, of old, tried by an inquest. Antiently trial by fire and water used.

By our antient law, all matters civil, as well as criminal, were tried by an inquest or assize of 12 men of the neighbourhood, all agreeing in one voice^c, and in capital cases they behoved to be landed men^d. But in those times the trial by water and fire (called *Vulgar Purgation*) was likewise accustomed in crimes, where a full proof could not be had. But such trial was, by express statute, discharged thereafter^e. At the same time a trial, by singular combat, took place, as after-mentioned.

^c Reg. maj.
l. 1. c. 12.
quon. attach.
c. 24.
^d Stat. Alex.
II. c. 3.
^e Stat. Alex.
II. c. 7.

3. Assizers of old judged upon their proper knowledge.

It is likewise evident, that originally the assizers were to judge only upon their own proper knowledge, so that if any of them were ignorant of the matter in issue, and declared so in judgment, others who knew it were to be chosen^f. And we find, in the books of the Feus, that the *Pares curiæ* determined always on their own proper knowledge^g; and in place of them our inquests succeeded.

^f R. M. l. 1.
c. 12.

^g 1. feud.
23, &c.

4. A conjecture how the necessity of the jurors agreeing in one voice came to take place.

It is probable, that the necessity of having twelve assizers or jurors to agree in one voice, was introduced on this occasion. When an oath of purgation (called *Canonical Purgation*) was put to the defender, charged with presumptions to clear himself of a crime, for which he was under prosecution, he behoved to exoner himself, not only by his own oath, but likewise by the oaths of 12 Compurgators, deposing That they believed he swore the truth^h. And we may justly suppose that the trial by 12 men proceeded in the same manner, and which is the opinion of Spelman, the learned English antiquaryⁱ.

^h Leg. burg.
c. 28.

ⁱ Spelm. gloss.
(ordellium).

5. The trial by singular combat; the procedure in it, and consequences of the same.

AFTER the vulgar purgation, or trial by water or fire, was discharged by our law, the trial by Battle or singular combat still continued; and it was, at the election of the party accused, Whether he would defend himself by battle, or be tried by an inquest^k. But some were exempted from fighting, as persons aged, religious men, clerks, and women^l, and likewise such as were landed men; all those might combat by another called a *Champion*^m. In criminal cases, the party who was overcome behoved to suffer punishment as if he had been convicted of the crime, if the defendant; and if it was the appellant, he was subject to the same punishment that the other must have undergone, if he had been foiled. This likewise went into universal

^k Quon. attach. c. 31.
61. leg. burg.
c. 14, 28.
^l Stat. Alex.
II. 5, 6.
^m Ass. Dav.
28.

^a James VI.
P. 16. c. 12.

universal difuse some ages fince; tho' I find no exprefs ftatute abolifhing it, till long after a trial by inqueft was accuftomed^a, to which I now return.

^b P. 1579.
c. 79.

As to the office of an inqueft, they are faid, in our ftatute, to be Judges and Witneffes^b; Judges, becaufe they judge upon the proof, how far it makes for the purfuer or defender. Witneffes, becaufe in fome cafes they may ftill judge on their proper knowledge, as is infinuated in the ftatute laft referred to, which concerns the Cognition of marches, on a brieve of Perambulation. But whatever was the cuftom of old, it would feem that they muft, at prefent, in moft cafes civil, and in all criminal ones, judge *Secundum probata*, i. e. according to the proof laid before them; for, by fpecial ftatute, all probation in criminal trials muft be taken in prefence of the affize^c; and confequently their private knowledge cannot be a rule. And, if it were, there could never have been place for affizes of error; and, in civil cafes, the point of right generally muft be vouched by proper documents, capable to fupport the verdict in a review.

^c P. 1587.
c. 91.

^d Quon. attach. c. 67.

^e Sup. tit. (Sheriff-courts).

^f Sup. tit. 9.
§ 11, &c.

TRIALS by an inqueft proceeded after the form in the feudal law, *Per pares curiæ*, and hence an inqueft with us has the epithet of Condign, i. e. confifting of perfons of equal dignity among themfelves, and with the pannel or defender. This was precifely obferved of old in the trial of perfons of all degrees^d; but at prefent the trial of one, by his peers, takes only place, in a ftrict fenfe, in the cafe of temporal lords; tho' ftill, in the trial of a landed man, the majority of the inqueft muft be of the fame condition. There remain few civil cafes that are tried now by an inqueft; thefe are only fuch as proceed on the feven brieves formerly mentioned^e. But we have no worfe method of proceeding; for the evidence, as well as the law, in all queftions of civil right, are cognofced and determined by the court of feffion, (where the cafe comes before them) confifting of 15 judges learned in the laws, in place of fo many honeft countrymen. But all crimes that infer capital punifhment, or demembration, or other corporal punifhment, muft be tried with us by a jury, before the criminal courts, the order of which I have fet forth at large already^f.

^g P. 1469.
c. 26.
P. 1503.
c. 95.

^h Quon. attach. c. 82.

ⁱ P. 1475.
c. 67.
^k Act of fed.
June 7.
1591.

As to the effect of a verdict in civil actions, it may be reviewed and reverfed, (as above hinted) in a reduction before the court of feffion. This came in place of Faling of Doooms, as appeals were called of old^g; and which were brought before the antient court of the lords of feffion, appointed of old, from time to time, as a committee of parliament, to cognofce civil caufes in the laft refort, to which the prefent court of feffion fucceeded. But, in criminal trials, the verdict of an affize cannot be reverfed, tho' given before inferior judges, which is an old and inviolable rule^h. The importance of thefe matters, and the neceffity of fpeedy execution of juftice, made this regulation neceffary. The jurors might, of old, have been fubjected to a grand inqueft of 25, called an Affize of Error. Thefe, by an old ftatuteⁱ, were to be noble perfons; but in practice, authorifed by act of federunt, landed-men were fufained^k. The ftatute mentions only the cafe of Pannels or defenders being acquitted Wilfully, by the partial favour of the affizers; and hence it may be juftly

6. Jurymen faid to be both judges and witneffes; in what fenfe does this hold; they cannot regularly now proceed upon their private knowledge.

7. With us, of old, all civil cafes were tried by an inqueft, which holds only now in feven brieves, formerly obferved; but the court of feffion in place of an inqueft; in what fenfe are the affizers called a condign inqueft; in what cafes is a trial by inqueft ufed.

8. The effect of a verdict in civil cafes is, that it, with the fentence thereon, is fubject to a review before the court of feffion; but, in criminal cafes, verdicts cannot be reverfed, tho' of old jurors might have been fubjected to an affize of error; this took only place where

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the pannel
was acquit-
ted. This
discontinued.

justly inferred, that there was no place for an assize of error, in case of his being condemned. The law presumed, *Præsumptione juris et de jure*, That an inquest of honest men, *Probi et fideles homines patriæ*, would not conspire to condemn an innocent person, tho' they might, out of weakness and compassion, acquit an offender. In this case, they were accused as *Temere jurantes super assissa*, or guilty of wilfull error in their verdict, and the punishment was escheat of movables, infamy, and one year's imprisonment^a; but the pannel, who was acquitted, remained so, and was not to be brought upon trial anew. But assizes of error were justly complained of as a grievance at the revolution^b, and have never since been used. By such assizes, persons that employed their service in attending trials, were greatly put in fear of being punished instead of being rewarded for their trouble. And the subjects were unsecure in their lives and liberties by the prosecutors, in many cases threatening the jury with an assize of error if they acquitted the pannel by their verdict; and by abolishing these assizes, such fears are removed, and peoples rights and liberties are delivered from such danger.

^a Reg. maj.
l. 1. c. 14.
ratified.
P. 1475.
c. 63.
^b Conven. of
estates 1684.
c. 8.

9. Verdicts
(*veredicta*)
justly so call-
ed, either in
criminal or
civil cases.
The king's
pardon does
not cut off
the judgment
as to the par-
ty's damages
and costs.

THUS verdicts (*veredicta*) are justly so called; for, in criminal trials, the facts found by the inquest in the verdict must be holden as true, and cannot be reversed. In an acquittal, the pannel must be deemed innocent as to all legal effects, tho' he had been actually guilty. In case of a conviction, no doubt, the king may, of grace and mercy, pardon all crimes as well after sentence as before, and thereby render ineffectual the conviction; but that is not a reversal of it. Nor will the king's pardon extend to the damages and costs taxed for the private party, That being an interest vested in him; more than a remission before sentence can exclude the assythment or satisfaction due to the injured, as was shewn elsewhere^c: And in cases of an attainder of high treason, the pardon will not restore the blood, as is likewise taken notice of in another place^d. In civil cases, verdicts and sentences thereon are in the same case as other decrees, *Res judicata pro veritate habetur*, they are holden just and true, unless reversed by a superior court on a review, as was above remarked.

^c B. 1. tit. 10.
§ 17.

^d B. 3. tit. 3.
§ 84, &c.

Observations on the Law of England, in relation to the Premises.

1. Trial by
battle took
place in
England: a
vestige of di-
vers kinds of
trials, in the
question put
to the party,
how he will
be tried.

IN the same manner, as with us, trial by combat took place in England of old, both in criminal and civil cases. In criminal, it was before the Constable and Marshal, and if the accuser in capital crimes was overcome, he incurred the same punishment that the defendant was to have suffered, if he had been vanquished, such being the law of arms, and the lord Marshal was to see the execution presently made. The whole form of procedure is described at great length by Spelman, which was a most solemn trial. He likewise sets forth the trial by Combat in civil cases, which was before the judges, who gave their sentence according to the event^a: and there having been divers kinds of trials, therefore the party accused had his election, How he would be tried: a vestige of which remains at this day; for the same question is, of course, still put to him, tho' there be only one manner of trial, viz. by a jury^b.

^a Spelm. gloss.
(campus).

^b Spelm gloss.
(ordellium)
19.

TRIAL

TIT. XXXIII. Observat. on the Law of England, &c. 665

TRIAL by Ordeal, which, in the Saxon language, imports *Not guilty*, was likewise practised in criminal cases in England: the defender, being arraigned, was asked whether he would put himself upon God and the country, or upon God alone? This last was meant of a trial by Ordeal, and therefore it was called *Judicium Dei*, the judgment of God: and if he was a freeman, he was tried by *Fire*, viz. passing upon nine bars of red hot iron, and if he escaped unhurt, he was acquitted, but otherways, he was condemned: and if he was of servile condition, the trial was by water. This *Vulgar purgation* (as it was called) was always condemned by the church as ill founded and superstitious; and, at last, wholly discontinued^a. Such trials were likewise antiently used by our ancestors, as I have taken notice in the foregoing title.

^aVin. (trial)
34.

THE trial by a Jury of one's country, is justly esteemed one of the chief excellencies of the English constitution. By it the lives, liberty, and estates of the subjects are secured, so as one cannot be divested thereof, or any ways injured therein, without the verdict of twelve honest and impartial men of his neighbourhood. And as this was the common law, it is confirmed by the great charter^b: and all other methods of trial, such as by battle and ordeal, have long since been laid aside as inconvenient.

^bC. 29.

JURIES are distinguished into Grand and Petty juries: the grand jury must consist of thirteen, or any greater number; for those being the grand inquisitors of the country, every indictment or presentment must be found by twelve, at least, agreeing in one voice. But the sheriff must return 24 or more, *Probos et legales homines patriæ*; and all juries ought to be of the same county where the crime was really, or holden as committed, not aliens or persons outlawed for a crime, and those returned on the grand jury must be freeholders^c.

^cBac. new
abr. (juries)
230.

THE petty jury consists of 12 men, agreeing in one voice; and if 11 be agreed, and one dissent, who will not agree, the verdict shall not be taken by the eleven, nor yet the refuser fined or imprisoned; for men cannot be forced to give their verdict against their judgment. Wherefore, in such case, the twelfth man will be delivered, and a new *Venire* must be awarded to bring in jurors, in order to a new trial^d.

^dBac. ibid.
269.

JURORS considered in a Ministerial capacity, are liable to be punished in several instances, as for not appearing, or for misbehaving themselves, &c. and the parties are likewise subjected if they act amiss in relation to the jurors. An attempt by either party, or a stranger to corrupt or influence a juror, or to incline him by gifts or promises, threats or persuasions, or any other way (except by opening and enforcing the evidence by council at the bar) which is called Embracery, is an offence punishable at common law, by indictment or action. It will likewise be a good cause to set aside the verdict: and if a man assault or threaten a juror for having been one in giving a verdict against him, he may be indicted as a disturber of the administration of justice^e.

^eBac. ibid.
284.

2. Trial by ordeal, called *Judicium Dei*; a freeman was thus tried by fire, and one of servile condition by water; this discharged by statute.

3. The trial by jury, the great excellency of the English constitution; this was the common law, and is confirmed by the great charter.

4. Juries are either grand, or petty juries; the requisitors of jurors.

5. What if one jurymen stand out, and will not agree with the rest.

6. Jurors in a ministerial capacity, how liable to punishment, or those who corrupt or influence them.

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7. What if the jury eat and drink at the charge of any of the parties.

IF the jury eat and drink at the cost of either party, after they are gone from the bar, and before they are agreed of the matter, their verdict shall not be received; but, if it is at their own cost, by the assent of their keeper, it shall not avoid the verdict, but they shall be fined for it ^a.

^a Vin. (trial)
p. 558.

8. Or if either party, or any for him, deliver any writings to the jury.

IF the plaintiff, after evidence given, and the jury parted from the bar, or any for him, delivers any letter, or other writing, to any of the jury, or any evidence or scrol, which was not given in evidence touching the matter in issue, this shall avoid the verdict, if given for the plaintiff, who misbehaved toward them, but not if given for the defendant, *et e contra* ^b.

^b Vin. ibid.
p. 559.

9. Jurors formerly liable to be questioned in the star-chamber.

FORMERLY jurors were liable to be questioned in the star-chamber (while that court subsisted) for partiality, in finding a manifest offender not guilty. But That was always thought a great grievance; and now the law is settled, that there is no such kind of proceeding ^c. Our law is most strict in this respect, as I have already shown ^d.

^c Hawk. b. 1.
c. 72. § 5.
^d Sup. tit. 9.
§ 12.

10. An attainder lies against the jury for a false verdict in a civil cause, but not in a criminal one.

AN Attaint lies against the jury for a false verdict only in a civil cause, but not in a criminal, by the law of England; because, in civil matters, it may be generally presumed, that a jury will be equally influenced with the fear of an attainder from either of the contending parties: whereas, if it were allowed in criminal cases, they would be in danger of the resentment of a powerful prosecutor, but could have little to fear from an injured criminal, such being seldom in circumstances to make their resentment formidable. And now the judges, from the difficulty of attainting a jury, grant upon such occasion new trials, whereby the jurors, delivered from the fear of an attainder, take greater freedom in giving verdicts than formerly, but an attainder is only discontinued, and not taken away by any statute ^e.

^e Hawk. ibid.
Vin. (attaint)
250.

11. It lies not only against the jury, but likewise against the party; the procedure in it. A grand jury tries it.

AN attainder was not only to punish the jurors, but also to answer the party grieved his damages; and therefore none could have it, but he that might be restored to the thing by the judgment, and it lies both against the jury and the party that had the judgment. The plaintiff, in an attainder, might not produce more witnesses, or give farther matter in evidence than what was brought in the first action; but the defendant might give more in affirmance of the first verdict ^f.

^f Vin. ibid.
263. 274.

12. The severe punishment of a jury convicted in an attainder.

IF the jury was convicted in an attainder, the judgment was, That they be outlawed, their goods and chattels forfeited, their wives and children thrown out of their houses, and their lands seized into the king's hands ^g. The punishment of jurors for a false verdict, called *Pœna temere jurantium super assissa*, which took place with us of old, was much the same, as above mentioned ^h.

^g 11 H. VII.
c. 22.

^h Reg. maj.
lib. 1. c. 14.

13. The jury may give their verdict without any evidence brought in open court.

THE law supposes the jury to have sufficient knowledge of, and capacity to try the matter in issue; and they must do it, tho' no evidence be given on either side in open court; yea, they may give their verdict contrary to the evidence brought in court, for they may have

^a Vaugh rep.
146.

have evidence from their own personal knowledge, by which they may be satisfied, that what is deposed in court is absolutely false^a.

^b Trial per
pals 221.

A JUROR may be examined on oath, as a witness, both in civil and criminal cases, and then he must be sworn in open court to give evidence; for the court and council are to hear the evidence as well as the jurors^b.

14. A juror
may be ex-
amined on
oath in court,
as a witness.

T I T. XXXIV.

Presumptions. Fictions of Law.

SECTION I. *Presumptions.*

THE means of proof, already discoursed upon, are those called Inartificial, because it is supposed, there is no art or argument used in applying them. I therefore proceed to the other kind of proof, called Artificial; because it arises from the circumstances of the parties and the cause, which therefore may be deemed a Circumstantial evidence. The grounds whereupon this artificial proof is founded are Presumptions.

1. Proof ei-
ther artificial
or inartifici-
al. The last
presumpti-
ons.

^a July 3.
1713. Coch-
ran of Kil-
maronock.
^b Lib. 2. ad
Heren. verf.
init.

PRESUMPTIONS are "Probable evidence concerning the truth of a fact." They are, by the doctors of the civil law, divided into three kinds, *Præsumptio hominis* or *judicis*, *præsumptio juris*, and *præsumptio juris et de jure*, and which our law observes. A presumption of the judge, or *præsumptio hominis* arises from the nature and circumstances of the fact, whence the judge presumes in favour of the one or the other party; wherefore the weight such circumstances shall have towards the condemning or absolving the defender, depends on the opinion of the judge concerning them, which must be regulated by the facts whereon they are founded. Thus, a number of strong concurring circumstances against a debt will be sufficient to extinguish it, tho' contained in a written obligation not retired^a. It is chiefly in respect to these, that Cicero^b calls this the difficultest part of an Orator, *viz.* When divers circumstances militate against a party, and perhaps as many tend to his exculpation, either for his lawier to clear his innocence, or for the prosecutor to load him with guilt, tho' there be no actual proof of it: or where various grounds of suspicion lie against a deed, either to support the faith of it, or to get the same rejected, notwithstanding there be no actual proof impeaching it: here the pregnancy of invention has a fit opportunity to exert itself. We have a remarkable instance of this in our law, in the indirect manner of improbation of a writing, from circumstances that tend to invalidate it, and may be a ground to set the same aside as false, even in opposition to one of the strongest presumptions of law, which is in favour of a deed, That it is just and true.

2. Presump-
tions. A pre-
sumption is
either homi-
nis, juris, or
juris et de
jure, by the
civil law and
ours. Pre-
sumptio ho-
minis, or a
presumption
of the judge,
what.

Præsumptio juris, or Presumption of law, is That which the law has introduced. By it a fact is holden to be true, unless by a proof the contrary appear, and must be sustained by the judge till such event, or that it is elided by a stronger presumption on the other side. There is a vast number of those in the law, many of which have been

3. A pre-
sumption of
law, is where
the law pre-
sumes a fact
to be true, till
it is elided

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by a proof, or stronger contrary presumption; of these divers instances given.

been touched upon in their proper places, in discoursing of the several subjects to which they relate. I shall here briefly mention a few. It is a presumption of the law, That a debtor does not gift to his creditor; That one is free from conventional obligations and servitudes; That one's possession is lawful; That moveables belong to the possessor; That one who pays interest is liable in the principal sum; That one does not pay unduly; That all solemnities requisite to an act were adhibited; That one is not ignorant of his own recent fact; That rights granted by a person insolvent to his near relations are gratuitous, &c. There are divers more such in our law. I shall particularly discourse upon some of them.

4. Presumed, that the child born by the wife is the husband's; how is it elided.

THUS it is a presumption of law, That the child born in wedlock is the husband's. This is so strong a presumption, that the acknowledgement of the husband to the contrary will not invalidate it; nor indeed of both the married persons *Ex post facto*, or sometime after the birth of the child, as I have fully set forth elsewhere ^a.

^a B. 1. tit. 2.
§ 3. b. 3. tit.
3. § 98.

5. A person in foreign parts presumed to be alive, till he would be 100 years of age.

ONE is presumed to live till he would have arrived at the age of 100 years; and therefore, 'tis incumbent on the party, who alledges that he died sooner, to prove it. This may take place, as to persons that have gone abroad to far distant countries, and liferent a subject here, which they had assigned before their departure; such assignee will be intitled to possess, unless the fiar, who insists to remove him, prove That the liferenter is dead, till such time that the cedent would be of the foresaid age, which is presumed the utmost termination of human life. After this period the assignee must prove, in order to possess longer, That the liferenter is still on life ^b. But, in ordinary cases, one who had gone abroad into foreign parts, and has not been heard of for many years, is presumed dead ^c.

^b Hume (presumptions)
July 30.
1734. Carstairs.
^c Spotsw. (summons)
Feb. 29.
1623. Ruthven.

6. The record of one's age from the baptism-books, regularly such a presumption; what if the day of the baptism, and not of the birth, is only recorded.

THE record of one's age in the church-session books, which is there inserted from the parents declaration, touching the time of the birth or baptism of the child, affords a presumption of law for it; but which may be cancelled by a contrary proof, That the person was truly born at another time than is there mentioned; but, if no such thing is offered, it will stand for a proof. Those records are indeed warranted by no statute, but being introduced by custom, and of excellent use to supersede a troublesome and uncertain proof of one's age, it is most just and reasonable they should afford a legal presumption for the truth of what's there recorded. Such profession by parents of their childrens age, recorded in any public books, was likewise sustained among the Romans ^d. Tho' only the time of the child's baptism is recorded, I should think it will presume, That the child was not above eight days older, children being usually baptized within that time; unless the parents were Anabaptists.

^d L. 16. ff. de probat. l. 1. c. si min se maj.

7. The presumption of law for a lawful marriage.

THE last presumption of law I shall specially discourse upon, is That which operates in favour of marriage, that it is lawful between the parties, who have cohabited openly as married persons, and that it is liable to no impeachment. This is founded not only in the nature of the thing, such cohabitation inferring marriage, without any proof of the actual solemnizing it, but likewise in the express statute, which

^e P. 1503.
c. 77.

^a June 1751.
Kennedy a-
gainst Camp-
bell.

which ordains, "That after the husband's death, the widow who
" was reputed and holden to be his lawful wife, shall have her
" terce, ay and while it be clearly decreed, and sentence given that
" she was not his lawful wife." An instance of this lately occurred.
A gentleman had openly cohabited for 20 years with a gentlewoman
as his lawful wife, and had children with her, and she was regarded,
as such, by all people in the neighbourhood, during his life. After
his death, another gentlewoman set up a claim of marriage with him
preceeding that period, and insisted in a declarator of it, in order to in-
title her to the privileges of his widow, and, by a judgment in the last
resort, was allowed to bring a proof of the same. In order to which she
produced the gentleman's declaration, or certificate of his marriage
with her, and some letters from him importing the same; but her claim
was set aside^a, since she brought no proof of an actual preceeding
marriage. And the certificate from the man could not be regarded,
for it might have been given to cover a criminal intercourse; nor
could it operate in prejudice of the third party's interest, and his let-
ters could be of no greater force. And therefore the marriage with
the other gentlewoman, which was holden and reputed lawful, be-
hoved to be sustained, and she to be intitled to all the rights and pri-
vileges of the gentleman's widow.

^b P. 1696.
c. 5.

^c P. 1696.
c. 4.

^d P. 1690.
c. 21.

Præsumptio juris et de jure, is That which the law not only pre-
sumes to be true, but ordains it to be taken for such, without liberty
to traverse it, or prove the contrary, *Lex præsumit et statuit super
præsumpto*. Thus rights, in security or satisfaction of prior debts,
must be taken to be of the date of the seisin thereon, when the
granter becomes a notour (notorious) bankrupt within 60 days of
the seisin^b. Again, one that is on death-bed is holden to be incap-
able to dispose of heritage; but convalescence, after the date of the
deed, is likewise so presumed, by the person's going to church or
market unsupported, or outliving 60 days^c. Writings, against which
a certification in an improbation is obtained, are taken to be false
and forged, while it stands. Thus likewise a woman who does not
reveal her being with child, nor call for help at the birth, is de-
clared guilty of child-murder, if it is found dead or amissing^d;
and there are many more of the like kind. In all those, the fre-
quency of the thing happening, as the law presumes, gave occasion
to establish the presumption into a truth, for the common good of
society.

8. *Præsum-
ptio juris et
de jure*, is that
which the
law presumes
not only to
be true, but
ordains to be
taken for
truth; divers
instances of
such.

SECTION II. *Fictions of Law.*

^e L. 11. pr.
ff. de reb.
cred.

A FICTION of law is introduced for the same reason, with this last
kind of presumption, but differs much from it; for, in a fiction, the
law supposes a thing really to be, which is not: a fiction, being "a
" supposition in law, for a good reason, against the real truth of a
" fact in a matter, possible to have been actually performed accord-
" ing to the supposition." Thus, an infant in the womb is esteemed
in law to be already born, in questions concerning its own benefit.
Again, a second delivery, *Fictio brevis manus*, is often feigned to
have intervened, when it does not^e. In all these cases the facts are
supposed by the law to be, when they are not, to serve the purpose

9. A fiction
of law is
where the
law supposes
a thing to be,
which really
is not. Ex-
amples of it.

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of equity, or to avoid multiplicity of deeds. A fiction cannot be invalidated by a proof to the contrary; for, That it is not fact, is supposed in a fiction.

10. Fictions of law can only be applied to the particular uses for which they were designed.

It is a rule, that *Tantum operatur fictio in casu ficto, quantum veritas in casu vero*, A fiction has the same operation in law as the actual truth would have in the same case. But it must be duly adverted, That fictions be kept within their precise bounds, to answer only the purpose of equity for which they were intended; and in that respect the above maxim, which is express in general terms, must be limited. Thus, for example, the king has a privilege, by a clause in his charters, to unite lands lying discontinuous, in order that, by such union, seisin taken upon any one part of the lands, shall be good for the whole, as if they were really contiguous, which frequently supercedes great trouble and expence to the parties concerned. But to that only particular intent this fiction can be applied, or is of use: for, put the case, that some of the lands lie in different shires from That in which the seisin is actually taken, such union will not warrant the registration of it in that shire to be good for those other lands; but it must be duly recorded, in the respective counties where the several lands actually lie, with which the king's grant cannot dispense. To give another instance; in summary decrees of registration, the party is feigned to appear by his procurator, and the judge to give decree against him, in order that execution may proceed thereon; and to that purpose alone the fiction can be applied; for, in other cases, as to the question of interrupting the prescription of the bond whereupon such decree proceeds, or as to the not proposing compensation against the bond, after such decree is given, the same hath no operation at all; which, however, would be the effect of other decrees.

Observations on the Law of England, in relation to the Premises.

1. The general import of presumptions, and instances of some of them.

INTENDMENT of law is the Understanding or Intelligence of the law, according to which all judges ought to regulate themselves in their determinations, and to regard what the law intends or presumes^a. There are three sorts of presumptions, Violent, Probable, and Light. Violent Presumption stands often in place of a clear proof. Probable moveth little; and Light Presumptions move not at all, according to the learned lord Coke^b. Divers presumptions of the law occur, which burthen the other party to prove the contrary; as That every one will act to his own advantage, &c. However, it is a maxim in law, that *In facto quod se habet ad bonum et malum, lex intendit magis de bono*. And another similar to it, *Lex semper intendit quod convenit rationi*. There are many maxims reducible to this head, as *Semper præsumitur pro sententia*, &c.^c

^a Vin. (intendment) 449.

^b Coke 1. inst. 6.

^c Vin. (intendment) 449.

2. Some things the law does not presume.

ON the other hand, there are some things which the law does not presume: thus, unlawful usury shall not be intended, and therefore must be expressly found by the jury; nor shall Covin be presumed, but must be directly alledged and proved^d.

^d Ib. p. 450.

THERE

^a 19 Cha. II.
c. 6.

^b 6 Annæ,
c. 18.

THERE is a presumption established by special statute ^a, viz. That where persons, upon whose lives leases of lands or tenements were determinable, have remained abroad beyond seas, or elsewhere, have absented themselves in England by the space of seven years together, they shall be accounted as naturally dead, in any action brought by the lessors or reversioners, for recovery of the tenements, unless sufficient and evident proof be made of their lives. And, by a later statute ^b, where one suspects the death of such persons to be concealed, he may, on affidavit made before the lord Chancellor, obtain an order to oblige those concerned in such persons to produce them; and, upon failure, they shall be taken to be dead, and it shall be lawful for those claiming any interest in the lands, in Remainder, Reversion, or otherwise, to enter upon the said lands accordingly.

3. Presumptions of law for one's death, after seven years absence, or requisition to produce him.

THE Transitory actions in the law of England give an instance of fictions of law, as indeed there are many such authorised by their law, to very good purpose: thus, by their constitution, all issues are to be tried in the county where the cause of action arises, for the sake of bringing justice home to the parties, and for the easy attendance of jurymen and witnesses; but because that may often be inconvenient, the plaintiff is admitted, in actions personal, to try his issue in what place or county he pleases, for the furtherance of justice: for it is a principle of law, That, in transitory causes of action, the plaintiff may alledge the same in what place or county he pleases ^c. Thus likewise, in a suit upon a deed granted in a foreign country, either not bearing the place where it was executed, or a place in such country, the plaintiff is allowed, in his count or declaration, to lay it as granted in some place in England, upon a fiction that the deed was there made; for otherwise no action could lie upon it in England ^d. But it is a rule, That fictions are not to be maintained beyond the reason which gave rise to them ^e.

4. Instances of fictions in the law of England.

^c Coke 1.
inst. 282. 2.
Rol. abr. 27.
confid. on the
law of forfeiture,
&c.
printed anno
1748. p. 90.
^d Coke 1.
inst. 261.
^e Confid. on
the law of
forfeiture,
&c. p. 62.

T I T. XXXV.

Advocations.

AFTER the probation is led, it comes to be advised by the judges, who give their decree according to the merits of the cause. But as actions before inferior courts may be advocated to a superior, in order to review the proceedings before decree, I shall first discourse of Advocations, which, as well as Suspensions and Reductions, are considered by the lord Stair as Actions in the Second Instance ^a; but Advocations are improperly so termed, as I formerly observed ^b. Suspensions shall be treated on after decrees, whereof they stay the execution; and as to Reduction of decrees, it is the same with any other ordinary action of reduction, which hath been considered already; so that, notwithstanding it be in the second instance, yet it has nothing peculiar in it. An Advocation is "The bringing a cause from before an inferior to a superior court, to be reviewed there, either in order to a Remit or final decision." It does not appear that any such remedy as advocations was in use among the Romans, tho' indeed, with them,

1. Advocations; no such remedy among the Romans.

^a B. 4. c. 3.

^b Sup. tit. 23.
§ 4.

a su-

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a superior judge could stop procedure before an inferior ^a, which may have given rise to our advocations.

^a L. 28. ff. de judiciis.

2. The great use of advocations.

THE remedy by advocation is of excellent use to hold inferior courts in the right path of justice. And if, after all, they shall happen to give judgment wrongfully, or against the right of the cause, the next resource is to a suspension, to stay execution upon their decrees, till the errors therein shall be rectified by the superior courts; or to a reduction of the same, if execution hath proceeded.

3. Advocations of anti-ent usage.

ADVOCATIONS are of very antient usage with us: thus, in the books of the Majesty, we have frequent mention of them in the same sense as at present; for where parties conceived themselves lesed by inferior judges in their proceedings, they might obtain their causes to be advocated from them to the high Justiciar, and if there was any wrong or iniquity done by them, the cause was carried from them to such superior court, and decided there; but, if otherwise, it was remitted or sent back to the inferior judge to receive its determination ^b. And in those days an advocation was competent to bring causes from a court-baron to the sheriff-court, on the head of iniquity; but which afterwards came to be discontinued, and takes no place at this day. Nor did, as I apprehend, ever since the institution of the college of justice, if not before; for the proceedings before baron courts are not subject to the review of the sheriff; but their jurisdiction is co-ordinate with his, tho' certain very antient statutes shew that, of old, the sheriff had a kind of superintendency over the courts of barons; as he had likewise in respect to those of bishops and abbots ^c.

^b Reg. maj. lib. 2. c. 16. § 24. lib. 3. c. 21.

^c Stat. Will. c. 16. Stat. Alex. II. c. 14.

4. Advocation, an incident action; the party against whom it is presented may consent to discussing upon the bill.

ADVOCATION is an Incident Action; and in civil cases a cause is by it craved to be removed to the court of session, to be discussd by them, or remitted to the same inferior court, with instructions, or to other competent and unsuspected judges. Before a bill of advocation is past by the ordinary on the bills, he takes a summary cognition of the reasons, and, in case of difficulty, reports it to the lords. The party against whom a bill of advocation is presented, may consent to discuss the reasons upon the bill, in which case the letters of advocation are not expedited; but the parties argue the point, *viz.* Whether the cause shall be advocated or remitted? and, if it be advocated, the parties proceed to the merits, in the same manner as if the advocation were expedited, and come in of course for discussing, and has the same effect for stopping procedure, in the mean time, before the inferior judge.

5. Letters of advocation expedite must be produced before the inferior judge, and instruments taken thereon; any procedure thereafter, till it is discussd, is a con-

BUT otherwise letters must be expedited in the king's name, under the signet, Discharging the inferior judge to proceed in the cause, and summoning the other party to compare before the lords of session, in civil cases, to have their judgment awarded concerning the grounds of complaint against the procedure before the inferior judge. The obtainer of the advocation need not formally summon the other party, but only judicially produce it before the inferior court, and take instruments thereon; and all farther procedure, in the cause thereafter, before that court, until the advocation be discussd, infers contempt of the lords authority, and subjects both party and judge to the

the consequences of it, Or till a protestation be obtained by the other party for not producing and insisting thereon.

tempt of the lords authority.

THE advocacy therefore must be regularly brought in before the lords, after the day of compearance is elapsed, and discussed, before the principal cause can be farther proceeded in. At discussing the reasons of advocacy, the single point is, Whether the cause shall be advocated or remitted. It is advocated either *In jure*, that is, for a relevant or sufficient ground in law to advocate the same; or Of consent, when the party, against whom it is raised, agrees to advocate the cause to the lords, without disputing the reasons. This is likewise the case, where the pursuer advocates his own cause; for the defender is not bound to admit the pursuer's removing the action from the court, where the same was brought by himself, without a just reason for advocating it. If the cause is advocated at discussing, then, in cases before the court of session, it proceeds in the same manner as if it had been originally intended before them: the libel before the inferior court becomes the libel before the lords, and all the interlocutors before the inferior court are abolished, and go for nothing, and thereafter there is the same procedure as in ordinary actions before the lords; for truly it becomes such.

6. The advocacy must be discussed before the principal cause can be heard; the cause is advocated either in jure, or of consent: when advocated, it proceeds as an original action before the lords.

IF, upon discussing the advocacy, the reasons are repelled, the cause is remitted Simply to the same judge, and it proceeds where it last stood, and in the same course; but, if it is remitted with Instructions, these must be observed in the subsequent procedure. This the lords do, if the inferior judge is competent, and the court of session not; and the judge has committed iniquity, as in consistorial cases before the commissars; or that the matter is intricate, and requires directions from the lords to manage it; or is of small moment, and not admitting discussion before the lords, as those within 12 l. Sterl. for tho', in the common case, iniquity is sufficient ground to advocate, yet it were a great hardship on the party to bring causes for such small sums before the lords, which would be exhausted by expences, and therefore the advocating them is discharged^a. By a remit with instructions, the other party regularly loses the remit-money to which he is intitled, if the remit is simple. If the cause is remitted to another judge more competent and unsuspect, it proceeds as if it had been originally begun there, without regard to the interlocutors before the first court, and the remit-money is then likewise lost; because 'tis clear in both cases, there was reason for the advocacy, and therefore the advocater ought not to be charged with that expence.

7. If the cause is remitted simply, remit-money is due by the raiser of the advocacy, and the cause proceeds as before; but, if remitted with instructions, or to another judge, no remit-money is due, and the cause proceeds in terms of the remit.

^a P. 1663. c. 9. act of reg. 1672. § 16. 20 Geo. II.

THE reasons of advocacy are plain from what is already hinted: incompetency and suspicion against the judge is the first. The grounds whereon those are founded have been formerly discussed^b. But, if any compearance is made for the defender, and allegations proponed, without declining the judge, it is understood to be past from, *Primus actus judicii est judicis approbatorius*. And therefore the pursuer cannot advocate on this head; because he has approbate the competency of the court by bringing his action before it. The second is iniquity, where the judge has past interlocutors not according to

8. The reasons of advocacy, are either incompetency of the judge, but that not pleadable by the pursuer; or iniquity, by a wrong judgment; or intricacy of law.

^b Sup. tit. 2. § 37, &c.

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the question
in issue.

law. The third is intricacy, when the cause is of that importance and difficulty, that it merits the cognizance of the superior court. All reasons of advocacy must be instantly verified, that time may not be consumed in disputing about preliminaries, without coming to the merits of the cause.

9. Advocations in criminal causes by the lords of justiciary; or by the judge of the high court of admiralty, in maritime cases.

THERE are likewise advocations in criminal cases, competent to be presented to the lords of justiciary, to remove a criminal prosecution from an inferior court, in order to be carried on before them, or to regulate the proceedings of such court; and which, in some respect, is proper before the court of session, as I have largely set forth elsewhere^a. As also, in maritime cases, to remove causes from inferior admiral courts to the high court of admiralty, which are presented to the judge thereof. On advising these advocations, the respective superior courts either admit or reject the advocacy as they see cause.

^a Sup. tit. 7.
§ 8.

10. A certiorari is granted at the request of the lord advocate, for removing an indictment from before justices of Oyer and Terminer to the court of justiciary.

WHEN an indictment of high treason, or misprision of high treason, is found in Scotland by justices of Oyer and Terminer, it may be certified into the court of Justiciary by writ of *Certiorari*, upon request made by the king's advocate to the lord chancellor, or lord keeper of the great seal, for that purpose, and the justiciary is to proceed upon, hear and determine the same, as the court of King's bench in England may do upon such indictment removed, and certified into the said court; but this regulation is only to be in force for seven years^b, unless thereafter continued.

^b 21 Geo. II.
c. 19.

Observations on the Law of England, in relation to the Premises.

1. The writ of habeas corpus cum causa removes an action from an inferior court to a superior; it cannot be granted in causes not exceeding 5*l*.

THERE are divers methods, by the law of England, for removing causes from an inferior to a superior court, or to stay proceedings in the inferior court. Thus, in civil actions, a writ lies, called an *Habeas Corpus*, for removing suits out of an inferior to some superior court, upon the application of the defendant, who conceives that he is, or may be injured by the proceedings of such court. By serving this writ the proceedings in the inferior court are at an end; the person of the defendant being removed, they have lost their jurisdiction over him; and, if they proceed thereafter, their proceedings are void, as *Coram non judice*, and all the proceedings in the superior court are *de novo*, and new bail must be put in^a. Tho' this writ is a writ of Right, yet where it appears intended to Abate a rightful suit, the court to which application is made for the same may refuse it^b. By the law of England, causes not exceeding 5*l*. cannot be removed by writs of *habeas corpus* from an inferior to a superior court; and, if such shall be granted, the judge from whom the cause is intended to be removed may notwithstanding proceed^c.

^a Coke 2.
inst. 52, &c.

^b Bac. new
abr. (habeas
corpus)

^c 13 Geo. I.
c. 22.

2. A writ of certiorari serves likewise in place of advocations.

A *Certiorari* likewise answers, in some measure, to advocations: it is a writ that lies, Where a man has occasion to produce a record of an inferior court into the chancery, from whence it may be transmitted to any other court, by a writ called *Mittimus*^d. I have taken notice, in the foregoing title, that in cases of high treason, and misprision of treason, a *certiorari* lies to remove the same from justices of Oyer and Terminer into the court of justiciary.

^d Finch. 443.

AN

TIT. XXXVI. Judgments, Sentences or Decrees. 675

AN Injunction is A writ granted by an interlocutory order of the chancery, to stay proceedings in the ordinary courts of the king. And it is sometimes directed to the ecclesiastical courts, upon matter suggested by the party, That he had a good defence in equity, or that the court has no jurisdiction in the cause, or has done injustice in the proceedings ^a.

^a Vin. (injunction)
p. 422.

OF the like effect is a Prohibition, with respect to staying proceedings in the spiritual court, in a matter which is temporal, or concerns the king's crown. This writ is directed both to the party and the judge, Prohibiting them to insist farther. But, if it appear afterwards to the judges temporal, That the matter is proper to be determined in the spiritual court, the party shall have a writ of Consultation, commanding the judges of the courts spiritual to proceed in the cause. This last writ is so called, because, upon consultation or deliberation, the judges comparing the proceedings with the Suggestion of the party, find the suggestion not proved, and therefore that the cause should be returned to the former court ^b. This writ may likewise be granted for staying proceedings in inferior temporal courts.

^b Les termes de ley verb. (consultation)

3. An injunction; it stays proceedings in an inferior court, and is sometimes directed to ecclesiastical courts.

4. A prohibition is a writ directed to stay proceedings in the ecclesiastical courts; and, if it is found groundless, a consultation is granted to authorize them to proceed.

T I T. XXXVI.

Judgments, Sentences or Decrees.

THE great design of judicial procedure is, That the judgments of the courts may be obtained, and execution sued thereon. Judgments are either Interlocutory, or Definitive and Final. This distinction we have from the civil law ^a. Interlocutory judgments are Such, whereby points relating to the cause, and previous to its final decision, are discussed. The principal of these, are the warrants for leading proof of the matters of fact controverted, whether by acts of litiscontestation, or before answer, or upon incident diligence. When the probation proceeds upon acts, great Avisandum is made with it, *i. e.* the same is remitted by the Ordinary upon the acts to the lords in presence, to be advised, who thereon give decree, as they find just. If it is led upon an incident diligence before the ordinary, he makes Avisandum with it to himself, and pronounces the decree accordingly. Acts regularly extracted cannot be summarily altered or recalled; but may, upon repeating a reduction, where the party is overtaken without his own fault. And interlocutory judgments before inferior courts are rectified, either by themselves, upon a new application; or by the superior courts, upon advocating the cause. Even the judgments, which are the warrants of decrees, are only interlocutors till the decrees are extracted by the clerk; for till then they are in the power of the judges, and may be altered by them. But, after extract of the decree, they are *functi*, and the interlocutors, which are the warrants of the extracted decrees, become definitive sentences.

^a Tit. cod. de sentent. et interlocut. omnium judic.

1. Judgments of courts, either interlocutory or definitive: the chief of the first kind, warrants for leading the proof; can such acts be summarily recalled; the warrants of final judgments interlocutory in effect, till extract of the decrees.

By express act of federunt, in daily observance, no decree can be extracted, unless it is put up in the minute-book, nor till 24 hours elapse after it is read of course therein ^b. And certain rules, for the expedition

^b Act of fed. Jan. 20. 1671.

2. Rules to be observed as to extracting decrees,

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or as to re-
claiming pe-
titions.

expedition of justice, are laid down by the lords of session, as to not altering or reviewing interlocutors after a limited time. But these rules are still with this implied limitation, That in case new matter of fact come to the party's knowledge or observation, petitions thereon grounded may be offered to the lords, till extract of the decree^a.

^a Act of sed.
July 9. 1709.

3. A decree is the final judgment of the court duly extracted; it is either condemnator or absolver, or both.

A DECREE, or decret, is "The final judgment or sentence of the court, whereby the question between the parties is decided, duly extracted." It is either Condemnator or Absolver: the first, when is given in favour of the pursuer, for the whole or part of his claim libelled: the other when in favour of the defender, by Affoiling, *i. e.* absolving him from the whole, or part of the pursuer's claim. Wherefore the same decree may be both Condemnator and Absolver, *viz.* where the defender is absolved in part, and condemned in part.

4. Decrees of the court of session are either by an ordinary, or by the whole lords; but both are of the same importance, after extract of the same.

DECREES of the court of session are pronounced either by Ordinaries, or by the Lords in presence; and after extract both are of the same importance and effect; for even in these, by an ordinary, it is the stile of an extracted decree, The lords, &c. decern, &c. A decree, upon the lords advising a probation, led in absence of the adverse party, is still but a decree in absence, when given against the defender, but will be esteemed as *in foro*, if given against the pursuer^b. And a decree, where the defender compares and propones peremptory defences before an ordinary, is a decree of the lords *in foro contradictorio*, tho' it contain no interlocutor or judgments of the lords in presence, but has the same effect, as if it had been pronounced by them; because parties are presumed to acquiesce to the judgments of the ordinary, when they do not reclaim to the lords, as I have set forth at large elsewhere^c.

^b Jan. 1735.
Craig contra
Craig.

^c Sup. tit. 7.
§ 6, &c.

5. Decrees may vary from the terms of the libel, either by the act of the judge, or of consent of the parties; they ought regularly to determine the costs of suit. Profits of the thing in suit, or damages thro' the suit, tho' not libelled, may be decreed.

DECREES may be otherwise than in the direct terms of the libel; for they may be qualified by the proposal or consent of the party, or varied by the judge, of his own motion. They however ought to be certain, not subject to the event of an uncertain condition; but the pursuer may be burthened with performance of some things to intitle him to a Condemnator; or the defender, in order to an Absolver. The expences or costs of suit ought regularly to be determined in the decree, for there is no place to demand them in a fresh suit, that pleas may not be generated out of pleas. But sometimes decrees are allowed to be extracted, Reserving the consideration of the expences, which, in consequence of such express reservation, may thereafter be cognosced and awarded^d, the suit, in such case, being still pendent in that respect. The court may adjudge costs of suit, tho' not libelled, being a consequence of the action, but damages cannot regularly be determined, without being claimed in the libel; because these are part of the principal ground of action. But damage thro' the suit, such as personal charges, which are sometimes allowed, as where personal attendance was necessary, will be sustained. The rule otherwise is, That a sentence cannot extend to things that have fallen out, or accrued, after commencement of the suit; except as to fruits and profits of the thing libelled, for these being accessory, are understood to be brought into judgment^e.

^d L. 3. cod.
de fruct. et
litium ex-
pensis.

^e L. 25. § 8.
ff. de ædilit.
edict. l. 3.
cod. de fruc-
tibus et lit.
exp.

DECREES

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DECREES are either in Absence, or upon Compearance and *In foro contradictorio*, as just hinted. Decrees in Absence are Where the defender, against whom they are pronounced, has not appeared at all, or only proponed dilators. Those give the benefit of *bona fide* possession of the fruits intermeddled with in consequence of them, till they are reduced; nor regularly can one be reponed against the same till he indemnify the other party of the expences in obtaining them. A pursuer sometimes to strengthen a decree in absence, leads a proof, and for that purpose extracts an act: this is called Litifcontestation *reo absente*. It is improperly so termed; for there can be no litifcontestation in a just sense, but where the defender appears, and makes opposition by Contesting the points in dispute with the pursuer, as the term imports.

6. Decrees are either in absence, or upon compearance; the effect of a decree in absence; litifcontestation, reo absente, improper.

A DECREE of registration is not, in any sense, a decree *in foro*; nor properly a decree in absence, but a decree of a special and singular nature. It proceeds without any citation of the party, and indeed without any actual pronounciation of the judge. The consent of the party, in the clause of registration to such decree, supplies both these; for he declares That the registration in the judge's books shall have the strength of a decree; and which registration, by a fiction of law, implies That the judge was present, and interposed his authority.

7. A decree of registration properly neither in foro nor in absence.

THE procedure, in order to such decree, is, That one is filled up as procurator in the blank left for inserting him, and is marked compearing in the party's name, and consenting to the decree. The procurator may be any advocate, or proctor before the court in whose books the writing is registred; he knows nothing of the matter, but is filled up by the clerk, who gives out the extract or the decree; and which was authorised by statute of session^a. Nor indeed does the judge, in whose presence the writing is said, in the extract, to be produced by the procurator, and whose authority is interposed, know any thing of the case: all is done *fictione juris*, in respect of the party's consent. Execution passes on these decrees, in the same manner as upon decrees on citation.

8. The procedure in order to summary decrees of registration.

^a Act of sed. Decem. 9. 1670.

DECREES of registration, being in virtue of the procuratory or mandate in the clause of registration, could not be given after the creditor's death; because all mandates fall by the death of the grantor or receiver: but this was remedied by statute, since they are mandates *in rem suam*, for the creditor's own behoof. So that now a writing may be registred at the instance of the singular or universal successor to the creditor after his death, in the same manner as it could have been before it^b. But still the debtor's death renders a summary decree of registration impracticable; because his heir or representative is not in the field. However, in virtue of such clause, the writing may be registred, after the debtor or granter's death, for Conservation; but neither could this be done without the aid of a statute^c; for the same reason, *viz.* because the mandate perished.

9. To what effect may writings be registred after the death of the grantor or receiver.

^b P. 1693. c. 15.

^c P. 1696. c. 39.

SUMMARY Decrees of registration cannot validly be obtained but before competent courts, which might have pronounced decrees against the debtors in an ordinary action; only if certain courts are

10. Decrees of registration can only be in courts

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competent;
how far re-
garded as
decrees.

specially mentioned in the clause, they are competent by prorogation, of which I discoursed formerly^a. Such decrees of registration proceeding without citation, have not the effect of interruption of prescription, nor do they exclude compensation, which cannot be proponed after other decrees^b. The writings receive no new force or strength by such decrees of registration, which serve only in order to diligence and execution, against the person of the defender, by caption, or against his moveable goods, by poinding; and so may be suspended, upon any grounds of law that lie against the deeds themselves, or grounds of debt.

^a Sup. tit. 2.
§ 18.

^b P. 1592.
C. 143.

11. Decrees upon com-
pearance, or
in foro, ei-
ther proceed
without an
extracted act,
or upon one;
the nature of
both.

DECREES upon Compearance, or *In foro contradictorio*, are either such as proceed without an extracted Act, or upon one. The first takes place Where the ground of the decree-condemnator or absolutor is instantly verified, and the adverse party's allegations repelled. Decrees upon extracted acts intervene, either When proof is led, in consequence of the act, which must be advised by the lords in presence; or when there is no proof led, and then the term is circumduced, at the suit of the other party, against him who was burthened with the proof, for not proving, *i. e.* he must be concluded in respect of his having brought no proof of his allegations; and decree-condemnator or absolutor is given at the same time, as the act directs. This course obtains where the relevancy is determined in the act.

12. If it is
upon an act
before an-
swer, does a
circumducti-
on of the
term make
way for a
decree.

BUT if it is an act Before answer, circumduction of the term will not carry along with it a decree, where the proof was only upon an incident question, not decisive of the cause. In such case a circumduction only implies a Conclusion of the party as to these points which were to be proved, and the cause must be farther proceeded in, without regard to the same. But if any proof to the purport of the act is brought, the same must be advised by the whole lords, in order to a decree, the relevancy being still open, which, at the same time, will be determined. But, in collateral or incident points, the proof ought to be taken on a diligence, and to be advised by the lord ordinary in the cause.

13. In an act
before an-
swer, if the
defender was
burthened
with the
proof, decree-
condemna-
tor, upon cir-
cumduction
of the term,
will be giv-
en of course;
but he may,
on applicati-
on to the
lords, be
heard on the
relevancy,
upon refund-
ing the ex-
pences.

IN an act before answer, for proving certain points decisive of the cause, if the pursuer was burthened with the proof, and brings none, the term will be circumduced against him, and decree-absolutor pronounced in favour of the defender, of course, by the ordinary on the acts, who circumduces the term: and if the defender was burthened with the proof, and adduces none, the term will be circumduced against him at the pursuer's instance, and decree-condemnator given at the same time, without necessity, in either case, to apply to the lords in presence for advising the relevancy, which would be a great retardment to business. But I apprehend that, in such case, where the defender is burthened with a proof Before answer, and brings none, he may apply to the lords in presence, to be heard on the Irrelevancy, or insufficiency of the libel in point of law, and will be admitted on refunding to the pursuer the expence of the act extracted for circumducing the term, and sometimes a farther consideration, in respect of the delay; for he ought to have represented against the interlocutor, and insisted to have the relevancy determined,

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ed, before the act for the proof went out. But, where the pursuer brings no proof, whether in an act before answer, or on the relevancy, the defender must be absolved by the rule, *Actore non probante, reus absolvitur*. Whether decree proceed upon an act or without it, does not alter the nature or force of it; for all decrees are *in foro*, where the defender propones peremptory defences; or where the defender, on advising the cause, is absolved, tho' no compearance was made for him, as above remarked.

ONLY decrees *in foro contradictorio*, before the lords of session, or other superior courts of judicature, in a proper sense, operate *Res judicata*, i. e. a final issue to the question. And such judgments cannot regularly be reversed or altered by any ordinary court of justice. And as to the remedy competent by appeal to the House of peers, as the last Resort, which may be made at any time within five years after extract of the decree, not counting the years of minority, That does not hinder the effect of *Res judicata* in the mean time, till a Writ of appeal is served. By the civil law, sentences became *Res judicatæ* after expiration of ten days, within which appeal might be entered, but not after ^a. I have spoken at large, in a preceeding title, of the exception of *Res judicata* ^b.

14. Only decrees in foro contradictorio, before the lords of session, or other superior courts properly operate *res judicata*; how became sentences with the Romans *res judicatæ*.

^a L. 23. § 1. ff. de contradict. indeb. l. pen. cod. de re judic. ^b Sup. tit. 25. § 7, &c.

A DECREE against several persons for the same debt only subjects them *pro rata*, or to proportionable shares of it; unless the nature of the thing, as against partners, tutors, &c. or the express terms of the decree, import that they are decreed *In solidum*, jointly and severally ^c; for otherwise the law is more propense to liberation than condemnation ^d, by the rule of law, that *Favorabiliores rei potius quam actores habentur*, The defenders are more favourably regarded than the pursuers.

15. A decree against several persons regularly subjects them only proportionably; sometimes otherwise.

^c Feb. last, 1626. Douglas. Feb. 9. 1675. Purvis. ^d L. 25. ff. de reg. jur.

THE effect of a decree *in foro*, or *res judicata*, regularly is, That it cannot be again suspended or brought under challenge by reduction, upon reasons that were Competent to have been proponed, and were not, or that were Repelled in the former decree ^e. These, in the language of our law, are said to be Competent and Omitted, or Proponed and Repelled; which regularly cannot be founded on in a suspension or reduction of a decree *in foro*, in order that suits may be abridged, and not lengthened out to perpetuity; nor does it alter the case, whether the defence omitted was in fact or in law ^f. If a suspension is offered of such decree, which, upon extraordinary occasions may be done, it must be advised by the whole lords in presence, in session-time, and by three in time of vacation. Decrees *in foro* may only be suspended upon matters emergent, or come to the party's knowledge after the decree, or upon strong grounds of equity; as where it proceeds upon a circumduction of the term against the party for not deposing, he generally will be reponed, upon refunding the other all his expences. But, where the lords are satisfied of his calumniousness, they will hold him fast, and not repone him to his oath, That being only an indulgence in exercise of the *Nobile officium*, which they may allow or not, as grounds of equity preponderate on the one part or the other. Where the party is minor, he will be reponed against competent and omitted, but not against proponed and

16. The effect of a decree in foro; how may a minor be reponed against it. One is reponed to his oath, after a circumduction of the term, if equity require.

^e P. 1672. c. 16. § 19.

^f Decem. 12. 1661. Gordon.

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and repelled ^a. It is the neglect of the doers for the minor, in not proponing what was competent; but the lords advise what is proponed, *viz.* Whether it be relevant, or good in law, to infer what is pleaded from it; and, if they repell it as irrelevant, there can be no difference in such case, whether the party be minor or major.

^a Newt. decif. 87.

17. Competent and omitted not regarded against foreigners, nor regularly in a decree of ranking of creditors.

THIS of competent and omitted is not laid hold on against foreigners, who are presumed ignorant of our forms ^b. An obvious error in a decree *in foro* may be rectified in a suspension. In a ranking of creditors, if a party's interest is either not taken notice of, or erroneously not ranked in its due place, it may be rectified after the decree is extracted; for truly such decrees are only *in foro*, so far as parties rights and pretensions have been disputed and decided ^c; but otherwise, for most part, the ranking is the work of the clerk, and the conductor of the process.

^b July 23. 1667. Hanf. Jargan.

^c July 1730. creditors of Tofts.

18. How far sentence past upon false writings, or thro' not production of the true documents, could be laid open by the civil law, or can by ours.

If the sentence was past upon false documents, remedy was competent against it by the civil law ^d, as no doubt it is by ours; but, if it past, thro' not production of the right documents, there was no redress by that law ^e. But it would seem reasonable and suitable to our course of proceedings, that if such writings were not industriously kept up, the party will be heard thereon in a suspension or reduction of the decree; for an allegation cannot be said to have been competent and omitted, when the party knew nothing of it. If a decree, tho' *in foro*, proceed on an error in fact, it may still be rectified ^f.

^d Tit. cod. si ex fallis instrumentis, &c.

^e L. 4. cod. de re judic.

^f Hume (decreets) Dec. 20. 1682. Moswall.

19. Decrees in foro against defenders are always *res judicatae*; but, as to pursuers only, so far as concerns the rights founded on by them; and in decrees of suspension, only as to points therein determined, or that were competent by way of suspension.

ALL decrees *in foro*, in ordinary actions, are *res judicatae*, both with respect to pursuers and defenders, and those deriving right from them: but, as to pursuers, the decree is only such against them, as to the rights and interests brought by them into judgment, but not as to other grounds of action which were not founded on. Hence, it is commonly said, that Competent and Omitted is not good against pursuers ^g. Decrees of suspension *in foro* are likewise *res judicatae*, as to all therein determined, but not as to such points as could only be insisted in by way of reduction; and, for most part, when such allegations are repelled, as not competent in a Suspension, Reduction is reserved, as Accords, or according to course of law. Nor will such decree of suspension exclude a second suspension of it, and the original decree upon new grounds. Thus generally, competent and omitted is not a good objection in the case of a decree of suspension, new grounds being always pleadable, tho' the party may justly be subjected to expences, if he vexatiously keep them up ^h.

^g Fount. Dec. 22. 1692. Kinloch. Jan. 17. 1711. Watfon.

^h Jan. 6. 1745. Glen-dinning.

20. In what respect decrees, even before inferior courts, may be termed *Res judicatae*: compensation not admitted thereafter, unless the de-

In a more general sense, all decrees are *Res judicatae*, in as much as They are to be held as true and just till they are reversed; and, if no suspension be raised of them, receive execution accordingly. Hence is the rule in the civil law, which takes place in the law of Scotland, that *Res judicata pro veritate accipitur* ⁱ. What is adjudged is holden for truth. This may be applied in a just enough sense to decrees of inferior courts, which are held good, till they are brought under challenge and reversed. But as what is proponed before an inferior court, and repelled, is still subject to the review of the superior

ⁱ L. 207. ff. de reg. jur.

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perior courts; so what was competent to have been proponed, and was omitted, may still be insisted in by way of suspension or reduction. Only if it appear, that obvious defences were omitted vexatiously, the lords may subject the party to expences before they are received. The decrees before inferior courts likewise are so far *res judicatae*, that Compensation is not thereafter receivable, which might have been proponed in the decree, because of the express terms of the statute ^a; but, if the decree is turned into a libel, it comes to be as a simple summons, originally intended before the court of session.

^aP. 1592.
c. 143.

decree is turned
to a libel.

THE form of all extracted decrees in civil cases is much the same, Premising the authority of the judge, the libel, compearance for the pursuer, and compearance or absence of the defender, and the writings produced for either party, and the sentence of the judges, as it is extended and modeled by the extractor, called the Grand Decerniture. After which follows the Because of the decree, as it is commonly termed from the initial words, and as containing the reasons that support the decree. This sets forth the whole steps of the procedure; and, tho' it is a tedious way, yet That is abundantly compensated by the usefulness of it, to shew the grounds of the several judgments. The decree being thus extracted, it becomes properly *res judicata*, which, by our forms, it is not deemed before, being till then in the power of the court, as before observed; but when the same is extracted, the cause is out of the court. And as judgments ought to proceed with deliberation. and upon due consideration of the merits of the cause, therefore the stile of extracted decrees before the court of session is, "The lords of council and session BEING
" WELL AND RIPELY ADVISED, decern and ordain, &c." In the like manner, it is justly observed by lord Coke, that judgment, *Judicium, quasi juris dictum*, is the voice of the law and right, and that the antient words of judgment are *Consideratum est*, &c. because judgment is ever given by the court, upon due consideration of the record before them ^b.

^bCoke 1. inst.
39.

21. The form
of decrees in
civil cases;
the extract
contains the
whole steps
of procedure,
which is ex-
pedient; it
imports, that
judgments
must proceed
with delibera-
tion.

To touch upon Judgments or Sentences in criminal matters. If the prosecution is in way of Complaint, at the suit of the party aggrieved, with concurrence of the procurator-fiscal, before an inferior court, for damages, and a fine or imprisonment, it differs little or nothing from That in purely civil cases. But, if it is by Indictment, and trial by an inquest or jury, in order to capital, corporal or high arbitrary punishment, as the whole procedure is solemn, so judgment is given with great deliberation and solemnity. And the form is the same, whether it be carried on before inferior criminal judges, or before the court of justiciary: and this is the course in all prosecutions before that court, the material steps of which I have hinted, in discoursing of that high court ^c; and to enlarge farther upon the same, would exceed the present design.

^cSup. tit. 9.

22. Judg-
ments and
sentences in
criminal mat-
ters touched
upon.

The END of the SECOND VOLUME.

